TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 570

SOUTHERN NATURAL GAS CORPORATION AND AMERICAN SURETY COMPANY OF NEW YORK, APPELLANTS,

vs.

STATE OF ALABAMA

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA

FILED DECEMBER 16, 1936.

SUPREME COURT OF THE UNITED STATES

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IN SUPREME COURT OF ALABAMA, THIRD DIVISION

No. 173

STATE OF ALABAMA, Appellant,

vs.

SOUTHERN NATURAL GAS CORPORATION, Appellee

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed November 23, 1936

To the Clerk of the Supreme Court of the State of Alabama:

You will please prepare and certify a transcript of the record in the above entitled cause, for use in the Supreme Court of the United States, pursuant to an appeal in said cause taken and allowed, and in making up said transcript observe the following directions and include therein the following pleadings and proceedings, to-wit:

1. This præcipe.
2. Transcript of record from the Circuit Court of Montgomery County, pages one to fifty, inclusive, together with certificate of record of the Register of the Circuit Court of Montgomery County, Alabama.
3. The opinion of the Supreme Court of Alabama, filed June 11, 1936.
4. Order entered June 11, 1936 by the Supreme Court of Alabama, reversing the decree of the Circuit Court of Montgomery County, Alabama.
5. Application for rehearing by appellee.
6. The order of the Supreme Court entered October 15, 1936.
7. Petition for appeal.
8. Assignment of errors.

[fols. 2-4] 9. Order allowing appeal.

10. Citation.
11. Jurisdictional statement.

12. Service on appellant in accordance with Paragraph 2 of Rule 12, Rules of the Supreme Court of the United States.

13. Bond securing costs of this appeal.

Cabaniss & Johnston, Counsel for Southern Natural Gas Corporation and American Surety Company of New York.

[fol. 5] [Caption omitted]

[fol. 6] IN CIRCUIT COURT OF MONTGOMERY COUNTY

In Equity

SOUTHERN NATURAL GAS CORPORATION

vs.

THE STATE OF ALABAMA

NOTICE OF APPEAL FROM FINAL ASSESSMENT BY STATE TAX COMMISSION—Filed May 26, 1931

The Southern Natural Gas Corporation, a corporation of the State of Delaware, hereinafter called appellant, by its attorneys, hereby files notice of appeal from a final assessment made by the State Tax Commission of Alabama, dated and entered on the minutes of the Commission on May 13th, 1931, wherein said State Tax Commission determined that appellant's franchise tax, payable for the year 1931 as a foreign corporation, was Eleven Thousand Forty Seven Dollars and Forty-Three Cents ($11,047.43).

This appeal is taken under Section 66 of the Act of the Legislature of Alabama approved July 22, 1927 (Acts, 1927, page 181). In addition to the filing of this notice of appeal, appellant has given bond contemporaneously herewith in double the amount of said final assessment, payable to the State of Alabama, and conditioned as provided by law.

Appellant avers that the assessment made as aforesaid is erroneous or void in the following respects, inter alia:

(1) Appellant is not doing business and does not propose to transact any business in the State of Alabama except interstate commerce.

(2) Said assessment erroneously includes in the computation of said assessment property or investment employed and proposed to be employed by appellant solely in interstate commerce.

(3) Said assessment erroneously includes in the computation of the amount of said franchise items of property or capital not fairly referable to any local or intra-state transaction done or proposed by appellant in Alabama.

Said assessment is erroneous and void, for the following reasons, inter alia:

(a) The same is in violation of the provisions of the Revenue Act of 1927.

[fol. 7] (b) Said assessment would deprive appellant of its property without due process of the law, and deny to it the equal protection of the law, in violation of the Fourteenth Amendment to the Federal Constitution.

(c) Said assessment is void as a direct burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution.

(d) The items included in the computation of the assessment do not constitute capital employed in intra-state business by appellant within the State of Alabama, within the purview of Section 232 of the Constitution of Alabama.

Wherefore, appellant prays that said assessment be annulled, for *for* such other relief as may seem meet and just.

Southern Natural Gas Corporation, by Cabaniss & Johnston, Attorneys.

[File endorsement omitted.]

[fol. 8] Bond on appeal for $22,094.86, approved and filed May 26, 1931, omitted in printing.

[fol. 9] In Circuit Court of Montgomery County

Transcript from State Tax Commission—Filed June 2, 1931

The following is a transcript of the assessment of the franchise tax of the Southern Natural Gas Corporation, a

foreign corporation doing business in Alabama, for the franchise tax year beginning January 1, 1931, for the purpose of an appeal by said Company from the assessment made by the State Tax Commission to the Circuit Court of Montgomery County, Alabama:

Southern Natural Gas Corporation has not transacted and does not propose to transact any local or intra-state business within the State of Alabama. Its sole function is the transmission of gas contracted for and purchased by it in the Monroe and Richland fields from points of delivery in said fields within the State of Louisiana to points in Mississippi, Alabama and Georgia. The gas so transported proceeds by continuous movement from the gas fields to destination without interruption.

As such the business is solely interstate commerce.

Mo. v. Kan. Gas Co., 265 U. S. 298.
Peoples Gas Co. v. Pub. Serv. Com'n, 270 U. S. 550, 554.
Pub. Util. Com'n. v. Attleboro Elec. Co., 273 U. S. 83.

The corporation's entire property in Alabama being used solely for the purpose of interstate commerce, the corporation's business is not subject to franchise or license taxes in Alabama.

Ozark Pipe Line Corp. v. Momier, 266 U. S. 555.
Sprout v. South Bend, 277 U. S. 163.

Any and all acts and transactions of the corporation within the State of Alabama, such as the construction, maintenance and operation of its pipe lines are solely in furtherance of and are incidental or accessorial to its said business of transporting and selling gas in interstate commerce.

For the above stated reasons, the entire property, cash, and all other capital employed in Alabama on December 31, 1930, was directly employed or directly held for the transaction of the company's interstate business and no franchise tax is payable in respect thereof.

The corporation does not now propose to transact any local business within the State but incidental matters may arise which might possibly make it desire to engage in some local transaction. In any such event a nominal amount of capital would be employed, in any event not to exceed $5,000. For that reason and in order to keep its qualification in

effect as to any such incidental matter or matters, the corpo-
[fol. 10] ration desires to make payment on the basis stated, viz: on the basis of a capital employed or to be employed in the transaction of local business in Alabama not exceeding $5,000.

All of the fixed property and assets of the corporation are employed and are hereafter to be employed in interstate commerce. Any property or capital which might hereafter be employed in some minor or incidental transaction would be located in Jefferson County. If, however, the Commission should desire a schedule of the proportions of the company's interstate property within the State of Alabama, the same as proposed for assessment is as follows:

Counties	
Autauga	$112,720.00
Bibb	62,391.00
Blount	5,576.00
Calhoun	273,500.00
Cleburne	228,906.00
Dallas	56,923.00
Elmore	62,925.00
Etowah	10,773.00
Hale	1,663.00
Jefferson	691,540.00
Lee	27,603.00
Macon	14,528.00
Mobile	124,483.00
Montgomery	6,988.00
Perry	87,514.00
Pickens	539,775.00
Russell	5,565.00
Shelby	60,186.00
St. Clair	287,267.00
Tallapoosa	4,595.00
Talladega	110,815.00
Tuscaloosa	513,198.00
Walker	24,795.00
	3,314,229.00

Southern Natural Gas Corporation Balance Sheet at December 31, 1930

Assets

Fixed Capital Assets, including $2,782,000 estimated value of Contracts and $3,650,806.29 Bond Discount and Expense			$38,820,604.39
Investments in Affiliated Companies at Cost			369,277.61
Current assets:			
Cash in Banks and on Hand		$201,011.20	
(a) Accounts & notes Receivable	$5,390,068.38		
Less: Reserve for Doubtful Accounts	16,000.00		
		5,374,068.38	
Inventories of Materials, Supplies, etc. at cost		222,641.58	
Special Deposit for Interest on First Mortgage 6% Sinking Fund Gold Bonds, due January 1, 1931		541,770.00	
			6,339,491.16
[fol. 11]			
Other assets:			
Prepaid Accounts		$8,303.07	
Miscellaneous		5,903.36	
			14,206.43
			$45,543,579.59

Capital & Liabilities

Capital Stock:			
Cumulative Preferred Stock. No par value—Authorised		200,000 Shares	
Designated as $7. Cumulative Preferred Stock (Entitled to $100 per share upon liquidation)	(b)	112,000 Shares	
Issued and Outstanding		50,000 Shares	$4,250,000.00
Second Preference Stock, no par value—Authorised		100,000 Shares	
Designated as Cumulative Second Preference Stock $7 Convertible Series (Entitled to $100 per share upon liquidation)	(c)	62,000 Shares	
Issued and Outstanding		16,050 Shares	1,284,000.00
Common Stock, no par value—Authorised	(d)	3,000,000 Shares	
Issued and Outstanding		642,380 Shares	1,395,750.00
			$6,929,750.00
Funded Debt:			
First Mortgage 6% Sinking Fund Gold Bonds, Series of 1914 (e)		$18,059,000.00	
Less: Bonds held for Sinking Fund Requirements Jan. 1, 1931		156,000.00	
		$17,903,000.00	
6% Convertible Sinking Fund Gold Debentures, series of 1944		11,500,000.00	
			29,403,000.00
Current Liabilities:			
Notes Payable		1,365,000.00	
Accounts Payable		1,956,603.21	
Accrued Interest on Funded and Unfunded Debt		766,345.44	
Accrued Rent & Insurance		96,426.23	
Accrued Dividends		47,891.00	
			4,232,265.88

Southern Natural Gas Corporation Balance Sheet at December 31, 1930—Continued

Capital & Liabilities—Continued

Current Liabilities—Continued		
Accounts Payable to Affiliated Companies	$3,548,694.11	
Less: Accounts Receivable from Affiliated Companies	505,398.41	$3,043,295.70
Deferred Liabilities and Unadjusted Credits:		
Consumers Deposit	1,000.00	
Unadjusted Credits in connection with sale of certain miscellaneous properties	384,351.66	385,351.66
Retirement Reserve:		48,896.35
Capital and Paid in Surplus		1,501,020.00
		$45,543,579.59

NOTES.—(a) Includes $5,000,000 proceeds of sale of "Mobile" Gas Pipe Line to be received. $2,000,000 of this amount is to be applied in reduction of accounts payable to Affiliated Companies, and the balance to be used in payment of other obligations.

(b) 62,000 Shares reserved for conversion of Cumulative Second Preference $7 Convertible Series.

[fol. 12]

(c) Under an underwriting agreement 45,950 shares Cumulative Preferred Stock $7 Convertible Series are to be issued on five days' notice.

(d) 1,840,590 shares reserved as follows—530,880 shares for stock purchase privileges of First Mortgage Bonds, 249,410 shares for Options and 1,013,500 shares for conversion of Debentures and Cumulative Second Preference Stock $7 Convertible Series and 46,800 for issuance under terms of underwriting agreement.

(e) $3,846,000 Par Value First Mortgage 6% Sinking Fund Gold Bonds, series of 1944 were sold on a repurchase agreement with an underwriting agreement for future resale.

Certificate of Auditors

We have examined the books and accounts of Southern Natural Gas Corporation as at December 31, 1930, and we hereby certify that the above balance sheet at December 31, 1930, is correctly prepared therefrom and, in our opinion, correctly sets forth the financial position of the Company at that date.

New York, February 26, 1931.

Arthur Young & Co.

NOTE.—All of the Company's property and assets are employed in interstate commerce.

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY

In Equity

SOUTHERN NATURAL GAS CORPORATION

vs.

THE STATE OF ALABAMA

Notice of Appeal from Final Assessment by State Tax Commission

The Southern Natural Gas Corporation, a corporation of the State of Delaware, hereinafter called appellant, by its attorneys, hereby files notice of appeal from a final assessment made by the State Tax Commission of Alabama, dated and entered on the minutes of the Commission on May 13th, 1931, wherein said State Tax Commission determined the appellant's franchise tax, payable for the year 1931 as a foreign corporation, was Eleven Thousand Forty Seven Dollars and *Forty-Seven Dollars and* Forty-Three Cents (11,047.43).

This appeal is taken under Section 66 of the Act of the Legislature of Alabama approved July 22, 1927 (Acts 1927, page 181). In addition to the filing of this notice of appeal, [fol. 13] appellant has given bond contemporaneously herewith in double the amount of said final assessment, payable to the State of Alabama, and conditioned as provided by law.

Appellant avers that the assessment made as aforesaid is erroneous or void in the following respects, inter alia:

(1) Appellant is not doing business and does not propose to transact any business in the State of Alabama except interstate commerce.

(2) Said assessment erroneously includes the computation of said assessment property or investment employed or proposed to be employed by appellant solely in interstate commerce.

(3) Said assessment erroneously includes in the computation of the amount of said franchise items of property or capital not fairly referable to any local or intra-state transaction done or proposed by appellant in Alabama.

Said assessment is erroneous and void, for the following reasons, inter alia:

(a) The same is in violation of the provisions of the Revenue Act of 1927.

(b) Said assessment would deprive appellant of its property without due process of the law, and deny to it the equal protection of the law, in violation of the Fourteenth Amendment to the Federal Constitution.

(c) Said assessment is void as a direct burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution.

(d) The items included in the computation of the assessment do not constitute capital employed in intra-state business by appellant within the State of Alabama, within the purview of Section 232 of the Constitution of Alabama.

Wherefore, Appellant prays that said assessment be annulled, and for such other relief as may seem meet and just.

Southern Natural Gas Corporation, by Cabaniss & Johnston, Attorneys.

[fol. 14] STATE OF ALABAMA

Foreign Corporation Return for Franchise Tax

This return must be filed with the State Tax Commission, Montgomery, Alabama, on or before March 15th, 1931.

Special Notice

Payment of the franchise tax becomes due on April 1st and will be delinquent if not paid on or before May 1st, except as hereinafter stated.

Returns must be filed with the State Tax Commission, Montgomery, Alabama, on or before March 15th. A penalty of $10.00 per day for each day's failure to make return accrues from the above date. On receipt of proper returns the Commission will assess the tax and will notify all taxpayers of the amounts due. A penalty of 1% per month, and interest at the rate of 8% per annum are provided by law for failure to make payment of the tax on or before May 1st unless the corporation filed its return within the

time provided by law, or unless the time for making return shall have been extended by the State Tax Commission in which event the penalty and interest do not accrue until thirty days after assessment and notice from the State Tax Commission. Corporations, therefore can protect themselves from penalties and interest only by filing returns on or before March 15th, and by remitting promptly upon receipt of notice of assessment by the State Tax Commission. Return must be executed by the president, or other executive officer, or the secretary of the corporation.

New Corporations.—See instruction No. 7 as to time for filing returns, penalty, etc.

Instructions

1. The franchise tax rate is two dollars on each thousand dollars (fractions of a thousand in proportion) of the actual amount of capital employed in this State by foreign corporations and runs according to the calendar year.

2. Every corporation doing business in Alabama, not organized under the laws of this State, is required to render a franchise tax return.

3. There must be attached to every return a condensed balance sheet drawn from the books of the corporation as at December 31st, 1930, or as at the close of the corporation's fiscal year ended in 1930 in cases where the books are not regularly closed at the end of each calendar year. Such [fol. 15] balance sheet must show the value of each asset listed within and without the State of Alabama. No return will be accepted unless a balance sheet is attached, or unless the return is accompanied by a statement properly sworn to, setting forth a satisfactory reason why such balance sheet cannot be furnished.

4. Duplicate blanks will be sent to every corporation. Only one report should be forwarded to the State Tax Commission. The other blank should be filled out and retained by the corporation for its own files.

5. Question No. 10 in relation to property assessments is intended to gain information necessary to enable the State Tax Commission to distribute the tax, as required by law, among the counties which may be entitled to a pro rata part thereof. In answering this question give the aggregate

valuation of the property as returned by the taxpayer in each county as at October 1, 1930. Do not give the hundred per cent valuation, but give the sixty per cent valuation as returned for assessment by the taxpayer. If assessment return has not been made to the Tax Assessor for the current tax year beginning October 1, 1930, in answering question No. 10, give the assessed valuation as fixed by law for the tax year beginning October 1st, 1929.

6. Do not fail to answer each question in the return. If unable to give information required, state reason on return why such information cannot be furnished.

7. A foreign corporation entering the State on or before July 1st of the current year will be subject to a franchise tax for the full year, but if such corporation enters the State after July 1st of the current year it will be subject to only one-half of the year's tax for the remainder of the current year. Such corporation is required to file return with the State Tax Commission within ten days from date of qualification to do business in this State. Failure to file return with the State Tax Commission within ten days subjects the corporation to a penalty of $10.00 per day.

[fol. 16] STATE OF ALABAMA

Foreign Corporation Return for Franchise Tax

This Return must be filed with the State Tax Commission, Montgomery, Alabama, on or before March 15th, 1931.

I, W. R. Gignilliat as Secretary of Southern Natural Gas Corporation, a foreign corporation, for the purpose of assessing its franchise tax for the year 1931 in accordance with the provisions of Sections 53 to 71, inclusive of the Revenue Act approved July 22, 1927, do make the following report:

1. Incorporated on 9th day of May, 1928, under the laws of the State of Delaware.

2. Principal place of business Watts Building, Birmingham, Alabama.

3. Qualified to do business in Alabama on 12th day of May, 1928.

4. Principal place of business in Alabama Birmingham, Jefferson County.

5. Kind of business conducted in Alabama—Interstate transportation and wholesaling of gas.

6. Name of authorized agent in Alabama—A. H. Arrington.

7. Address of authorized agent in Alabama—South Perry Street, Montgomery.

8. Where should correspondence relating to franchise tax be addressed—Watts Building, Birmingham.

9. To whom should correspondence relating to franchise tax be addressed—R. C. Backus.

10. Property assessed for taxation in Alabama as at October 1, 1930 (This information for distribution of tax, as provided by Section 57 of Revenue Act approved July 22, 1927).

County: See schedule attached. Total Assessed Valuation $——.

County: ———— Total Assessed Valuation $——.

County: ———— Total Assessed Valuation $——.

County: ———— Total Assessed Valuation $——.

(Information required below to be furnished from the Books of the Corporation as at December 31, 1930, or at close of fiscal year ended in 1930.)

11. Cash on hand and on deposit in Alabama—See Schedule attached.

[fol. 17] 12. Accounts and notes receivable due by residents (corporations or individuals) of Alabama $——. See schedule attached.

13. Accounts and notes receivable due by persons (individual or corporate) not residents of Alabama arising from shipments or sales of articles manufactured in Alabama, or from stores, warehouses or storage depots maintained in Alabama—See schedule attached.

14. Amount of prepaid insurance, interest, etc., and other deferred debits in Alabama $——.

15. Book value of shares of capital stock owned in corporations organized under the laws of Alabama—See schedule attached.

16. Book value of bonds of the State of Alabama or of any county or municipality thereof or of corporations organized under the laws of Alabama—See schedule attached.

17. Book value of property assessed for taxation in Alabama—See schedule attached.

18. Book value of property, both tangible and intangible, in Alabama not assessed for taxation in Alabama and not included in answering Questions 11 to 17 above—See schedule attached.

19. Book value of other assets in Alabama not enumerated above—See schedule attached.

20. Loans secured by mortgage on real estate in Alabama on which the recording privilege tax has been paid and not included in amounts under Questions 12 and 13—See schedule attached.

21. A condensed general balance sheet, showing separately the value of each asset within and without the State of Alabama, drawn from the books of the corporation as at December 31, 1930, or as at —— is hereto attached and made a part of this return.

Balance Sheet as at December 31, 1930, attached.

22. A brief statement of all property, real and personal, owned by the corporation in Alabama, giving the location and value of such property by counties: See schedule attached.

(Signed) Wm. Gignilliat, Southern Natural Gas Corporation.

[fol. 18] STATE OF ALABAMA,
County of Jefferson:

Before me F. H. Richmond, a Notary Public in and for said County and State on this the 11th day of March, 1931, personally appeared W. R. Gignilliat known to me to be the

Secretary of Southern Natural Gas Corporation, a foreign corporation, and being by me first duly sworn, doth depose and say that the foregoing statement made to the State Tax Commission of Alabama, for the purpose of assessing the franchise tax of said corporation is a true, full and correct statement.

Witness under my hand this 11th day of March, 1931.

(Signed) F. H. Richmond, Notary Public Jefferson County, Alabama. My commission expires March 15, 1933.

(This Space for Use of State Tax Commission)

Amount of franchise tax determined by Tax Commission $11,047.43

Corporation notified May 13, 1931.

May 13, 1931.

The State Tax Commission, upon report made to it, together with correspondence on file, does hereby assess the franchise tax for the year 1931, as provided by the Revenue Act of 1927, upon the Southern Natural Gas Corporation, a foreign corporation, in the amount of eleven thousand, forty-seven dollars and forty-three cents ($11,047.43), said tax being based upon capital employed in Alabama amounting to five million, five hundred twenty-three thousand, seven hundred fifteen dollars ($5,523,715.00), composed of the following items:

Property in State of Alabama $5,523,715.00

Done at the Capitol, Montgomery, Alabama, this the 13th day of May, 1931.

(Signed) S. R. Butler, State Tax Commissioner.
(Signed) Julia Klinge, Secretary.

[fol. 19] Secretary's certificate to foregoing transcript omitted in printing.

[File endorsement omitted.]

[fol. 20] IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

AGREED STATEMENT OF FACTS—Filed May 18, 1935

In the above styled cause, it is agreed by and between the parties hereto, by their respective solicitors, that the following is a correct statement of the facts, which may be received and considered by the Court on the submission of the above styled cause without further evidence or proof thereof, to the extent that the same may be relevant or material, and with leave to either party to introduce any further or additional evidence or testimony upon the submission:

(1) The Appellant, the Southern Natural Gas Corporation, was organized prior to May 12, 1928, under the laws of the State of Delaware. On, to-wit, May 12, 1928, it qualified to do business in the State of Alabama as required by law, and named a statutory agent and filed in the office of the Secretary of State of the State of Alabama a copy of its charter. The charter in brief authorized it to store, transport, buy and sell, oil, gas, salt, brine, and other mineral solutions; to manufacture, acquire, distribute, use and sell artificial gas and to acquire, produce, use and sell the by-products and the residual products therefrom, and construct, maintain, operate, etc., all works necessary; to mine, produce, buy, acquire, use, sell, and distribute natural gas and its by-products and to acquire all works, equipment, and appurtenances necessary therefor; to produce, generate, buy, use and sell a mixture of artificial and natural gas to distribute the same and to construct such ways and works as necessary therefor; to construct, lay, purchase, acquire, maintain, and operate, sell, encumber or otherwise dispose of all necessary pipe lines, gas mains, plants and systems, for the use, sale and distribution of gas, over or under streets, alleys, etc., through private property and to acquire the same by eminent domain; to acquire, manufacture and deal in ice. Also an elaborate enumeration of powers connected with and incidental to the foregoing businesses including the right to sell stocks, bonds, etc.

(2) On July 29, 1929, amendment to the charter was filed in the office of the Secretary of State further elaborating its

powers and a like amendment was filed in the office of the Secretary of State on November 20, 1930.

[fol. 21] (3) From the date of the qualification of the Southern Natural Gas Corporation through and including the date of the assessment appealed from, the Corporation had been qualified to do business as a corporation in the State of Alabama and has had the right to use and enjoy all the powers as authorized by its charter; that it paid a permit fee annually and annually secured the right to so whatsoever it was legally authorized to do in the State of Alabama.

(4) At the time of the assessment the corporation maintained its office and chief place of business in the City of Birmingham, Alabama; a majority of orders for gas were received by and cleared through the Birmingham office; all collections for sales were received and disbursements for expenses made or authorized at said office; that the entire management, control and conduct of the business was conducted from said office; the corporation owned and operated automobiles and motor trucks which were used in the maintenance of its pipe lines; the corporation maintains a bank account and has offices and office equipment in Birmingham; the contract under which gas is supplied by the corporation to the Birmingham Gas Company was made and approved in Birmingham; the contract with the Alabama Utilities Service Company was made and executed by the officers of the corporation in Atlanta, Georgia, and the contract under which gas is supplied to the Tennessee Coal, Iron and Railroad Company was made and executed by the officers of the corporation in the City of New York.

(5) That the subsidiary of the United States Steel Corporation hereinafter referred to is principally the Tennessee Coal, Iron and Railroad Company and other affiliated companies operating steel and industrial plants in the Birmingham district and which are not public utilities but which consume the gas in their own right.

That the sales to the Tennessee Company and its affiliates are made from time to time orders given by the Birmingham office as the needs of such purchasers require; that the gas purchased by these companies is transported into the State through the high pressure transmission system of Southern Natural Gas Corporation, which is made up of

the main high pressure line and its numerous laterals, which deliver natural gas to its various customers at the border line of their premises; that in the sales to the Tennessee Company and its affiliates the pressure is reduced at the point of delivery for the accommodation of the purchaser to meet their needs and requirements. The exact quantities of gas required by the corporation's customers in the State are purchased by the corporation from the [fol. 22] producers in the Louisiana and Mississippi fields each day.

(6) Beginning in, to-wit, May, 1929, appellant began the construction of its pipe line for the transmission of natural gas as aforesaid, and by January 1, 1931, appellant had constructed its main lines from the Louisiana fields to Atlanta, Georgia, and Columbus, Georgia, the Columbus line turning South from the Atlanta line at a point near Tuscaloosa, Alabama.

(7) Appellant has from the outset made use of said transmission line solely for the purpose of transmitting natural gas, originally from the natural gas fields known as the Monroe field and the Richland field in northeast Louisiana, and subsequently (beginning in the Spring of 1931) including a small proportion of gas from the natural gas fields in the vicinity of Jackson, Mississippi.

(8) Since organization, appellant's business had been the transmission of said gas from the Louisiana and Mississippi fields above mentioned for sale in the several states mentioned, other than the State of Louisiana, in which no sales were made.

On January 1, 1931, and thereafter up to and beyond May 13, 1931 (the date of the final assessment herein appealed from), appellant entered into and held no contract for the delivery of natural gas to any person, firm or corporation within the State of Alabama, except to the following corporations, viz:

(a) Alabama Natural Gas Corporation. This corporation was not a consumer of gas. It was throughout the year 1931 and prior thereto engaged in the distribution of natural gas purchased from appellant, said Alabama Natural Gas Corporation being a public utility doing business

in Alabama in intrastate commerce and subject to regulation by the Alabama Public Service Commission.

A copy of the contract with Alabama Natural Gas Corporation is hereto attached marked Exhibit A and made a part hereof.

(b) Southern Cities Public Service Company, a holding company which entered into contract with appellant for the supply of the subsidiary distributing companies of Southern Cities Public Service Company, doing business as public utilities in the State of Alabama, viz: Alabama Utilities Service Company, Tri-Cities Gas Company, and Mobile Gas Company. None of said corporations were consumers of gas. All were and are distributors.

(c) Birmingham Gas Company and subsidiary or affiliated company (Industrial Gas Corporation), both utilities or distributing companies and not consumers.

[fol. 23] (d) Subsidiaries of the United States Steel Corporation, viz: Tennessee Coal, Iron & Railroad Company and Universal-Atlas Cement Company, which purchased gas at their respective meter stations and distributed same by their own lines to their several points of operation.

A copy of the contract with the Tennessee Coal, Iron and Railroad Company is hereto attached marked exhibit "B" and made a part hereof.

All deliveries made by appellant to all of said purchasers were made under the following conditions:

The gas sold to the said purchasers was gas delivered in continuous movement from the gas fields in Louisiana or Mississippi without break or interruption, to the point where it was delivered to and received by the purchaser, viz: the meter house at which the gas so sold was measured for the purpose of payment.

In cases of all deliveries made by appellant, the gas was moved under unregulated gas pressure, as produced by the natural pressure of the gas wells, to the designated points of delivery; in all cases in continuous flow from the Louisiana or Mississippi gas fields without cessation from the beginning of movement outside of the State of Alabama until delivery.

The foregoing statement is correct as of January 1, 1931, the accrual date of the tax assessed for such year and upon which this appeal is based. The Company had at that time in course of construction pumping, stepping up or compressor stations in the State of Alabama for the purpose of increasing or regulating the pressure and flow of such gas and from time to time have utilized such equipment since its completion.

During the year 1931, appellant transacted and proposed to transact no business within the State of Alabama other than the business of selling, transmitting and delivering gas as aforesaid and in the manner hereinbefore set out or business incidental to or directly accessorial to such sale, transmission and delivery, and had no property in the State except as herein stated, used in said business.

(9) Appellant owned on January 1, 1931, and during 1931, approximately 564 miles of pipe of varying diameter, and various items of real and personal property, located within the State of Alabama, all constituting part of its said general transmission line system and used and held for use in said business. In the event that it should be lawfully held in this proceeding that all of appellant's property and assets located within the State of Alabama are to be held to constitute capital employed by appellant within the State of Alabama in the transaction of local business, [fol. 24] with respect to which appellant was on the date of the assessment herein appealed from, subject to the assessment of a franchise tax as a foreign corporation transacting local business within the State of Alabama, it is agreed (solely for the purpose of this hearing) that the value of said property as of January 1 to May 13, 1931, was $5,500,000.00, appellant contending, however, that the facts above set out do not constitute the transaction of any local business whatsoever within the State subjecting appellant to a franchise tax under the laws of Alabama in respect thereof, also that, even if such business were subject to a franchise tax, it could not be validly levied in respect to that property used and held for use solely in making deliveries to said utilities or distributing companies or in transmitting gas through the State of Alabama into the State of Georgia.

(10) It is further agreed that the part of appellant's said system and property used to any extent whatever by

appellant in the sale or delivery of natural gas to the said subsidiaries of the United States Steel Corporation, as distinguished from the part or proportion of said property used solely in transmitting natural gas from the Louisiana-Mississippi fields through the State of Alabama into the State of Georgia, or for deliveries to the non-consumer utility or distributing companies above mentioned, may be determined as follows:

(a) Proportion of value of system and property located in Alabama used in whole or in part in making delivery to United States Steel Corporation subsidiaries 46.8%

(b) Proportion of value of system and property located in Alabama east of points of delivery to United States Steel Corporation subsidiaries or south of main line used in effecting deliveries to United States Steel Corporation subsidiaries and not used in whole or in part in making deliveries to said United States Steel Corporation subsidiaries 53.2%

Cabaniss & Johnston, Attorneys for Southern Natural Gas Corporation. A. A. Carmichael, Attorney General. Frontis H. Moore, Assistant Attorney General.

[File endorsement omitted.]

[fol. 25] EXHIBIT "A" TO AGREED STATEMENT OF FACTS

Agreement Between Southern Natural Gas Corporation and Alabama Natural Gas Corporation

October 31, 1929.

This Agreement made and entered into this 31st day of October, 1929, by and between Southern Natural Gas Corporation, a corporation duly organized and existing under the laws of the State of Delaware (hereinafter called "Seller"), party of the first part, and Alabama Natural Gas Corporation, a corporation duly organized and existing under the laws of the State of Delaware (hereinafter called "Buyer"), party of the second part,

Whereas, Seller has under construction a gas pipe line for the transportation of natural gas from the Monroe Gas Field and the Richland Gas Field in the State of Louisiana into the States of Mississippi, Alabama and Georgia; and

Whereas, Seller has made and entered contracts with Interstate Natural Gas Company, Incorporated, Hope Producing Company, Southern Carbon Company, United Carbon Company, Industrial Gas Company, Moody-Seagraves Company, Moody-Seagraves Gas Company, Incorporated, and the Palmer Corporation of Louisiana, all of said contracts being dated January 15, 1929, and with W. C. Feazel dated November 16, 1928, for a supply of natural gas for transportation by said pipe line, extensions and laterals; and

Whereas, Buyer holds certain contracts for the sale of natural gas to industries and has made application to Alabama Public Service Commission for a certificate of public convenience and necessity for the construction of a system for distribution of gas as a public utility, subject to sundry conditions and limitations, within the area covered by said application, viz, in the counties of Pickens, Tuscaloosa, Jefferson, St. Clair, Cherokee, Calhoun, Talladega, Cleburne, Walker, Shelby, Blount, and Etowah; and desires to make provision for a supply of natural gas for said purposes and for such other public service as Buyer may hereafter undertake; and

Whereas, Seller has agreed with Buyer on the sale and delivery to Buyer in interstate commerce of natural gas for distribution or sale by Buyer on the terms and conditions herein stated;

[fol. 26] Now, Therefore, this agreement Witnesseth, in consideration of the premises and of the terms, conditions and payments herein set forth, the parties hereto have covenanted and agreed and by these presents do hereby covenant and agree as follows:

Section 1. The Seller agrees to sell and deliver and the Buyer agrees to purchase, take and pay for such amounts of natural gas as may be requisite to fulfill

(a) those certain agreements with industrial consumers heretofore assigned by Seller to Buyer, referred to on the schedule hereto attached marked Exhibit A;

(b) the requirements of Buyer for the distribution of natural gas as a utility within the counties of the State of

Alabama referred to in the Buyer's said application pending before the Alabama Public Service Commission for certificate of convenience and necessity;

(c) the requirements of Buyer for the distribution of natural gas to such other customers in said areas and in such other areas as shall hereafter be specifically approved by Seller in writing as included within the scope of this agreement.

The Buyer agrees that it will advise the Seller's representatives as far in advance of changes in its demands as operating conditions will permit, but the Seller shall not be obligated to sell or deliver hereunder, at any time, natural gas in excess of the amount it has available for delivery under the contracts with the producers or owners of gas rights hereinbefore recited and such contracts, if any, as may be entered into by Seller pursuant to the provisions of Section 20 hereof, together with such gas, if any, as Seller may have available pursuant to the provisions of Sub-section (b) of Section 11 hereof.

In the event that the Seller shall desire to sell or distribute natural gas to customers other than the Buyer for sale and/or other disposition and/or other utilization in any area covered by this agreement in which Buyer shall be authorized to sell and distribute gas, the Seller may on the date when the delivery of gas hereunder begins or on any day thereafter give written notice to the Buyer specifying the municipality or territory in respect to which Seller desires to sell gas for distribution. The Buyer shall have one month after the receipt of any such written notice in which to elect whether or not the Buyer desires to and will undertake to engage in the distribution and/or sale of natural gas in the municipality or territory specified in such notice from the Seller and/or to sell natural gas to the customer or custom- [fol. 27] ers proposed to be served as specified in such notice from the Seller and within which to deliver written notice of such election to the Seller. If within any such month the Buyer shall give written notice to the Seller of its election to undertake the distribution and/or sale of natural gas in such territory and/or to sell natural gas to such customer or customers, the Buyer shall proceed forthwith so to do. In the event that (1) Buyer does not within any such month deliver to the Seller written notice of its election to under-

take the sale and/or distribution of gas in such municipality or territory and/or to such customer or customers; and/or (2) Buyer fails to proceed forthwith to begin distribution and/or sale of natural gas in such territory and/or to such customer or customers, the Seller shall have the right to enter into contract with others with reference to the sale of and/or distribution of gas in such municipalities or territory and/or to such customer or customers.

Section 2. The places of delivery of natural gas deliverable hereunder shall be at the outlets of the metering stations to be installed by the Seller at such points on Seller's main or branch line and right of way as shall be requested by Buyer (the exact location, however, to be determined by Seller) and Seller shall furnish, install, operate and maintain at its own expense said metering stations, properly equipped with orifice meters, and recording gauges, or such other type of meter or meters of standard style as may be mutually agreed upon, the measurements of which shall fix the total amount of natural gas delivered by the Seller into each of the Buyer's distribution systems.

Each metering station delivering gas to the Buyer shall, for the purposes of the computation of natural gas deliveries and the ascertainment of the monthly payments hereunder, be deemed to be separate and distinct from every other delivery point, and the deliveries of gas at the several delivery points shall be computed separately and not taken together for said purposes. The metering equipment so installed by the Seller, together with any buildings erected by it for such equipment, shall be and remain its property.

Section 3. Buyer shall have access to said metering equipment at all reasonable times, but the reading, calibrating and adjusting thereof and changing of charts shall be done only by the employes or agents of Seller. Charts and records from such metering equipment shall remain the property of the Seller. Upon request of Buyer, Seller will submit to Buyer records and charts from its metering equipment, together with calculations therefrom, for Buyer's inspection [fol. 28] and verifications, subject to return by Buyer within ten (10) days after receipt thereof, after which return the charts and records shall be kept on file by Seller for the mutual use of both parties for a period of one (1) year. On a date as near the first of every month as practicable,

Seller shall calibrate its meters in the presence of representatives of Buyer and the parties shall jointly observe any adjustments which are made to the meters, should such adjustments be necessary, and, if the check meters hereinafter provided for have been installed, the same shall also be calibrated by Buyer in the presence of representatives of Seller and the parties shall jointly observe any adjustments should such adjustments be necessary. If either party at any time desires a test of any meter or if either party at any time observes a variation between the delivery meter and the check meter, if any such check meter is installed, it will promptly notify the other party and the parties will then cooperate to secure an immediate calibration test and joint observation of any adjustments and the meter shall then be adjusted to accuracy and corrections jointly made for the monthly settlements. Each party shall give to the other party notice of the time of all tests of meters sufficiently in advance of the holding of the tests so that the other party may, if such party so desires, have its representatives present. If, upon any test, any metering equipment is found to be inaccurate by two percent (2%) or more, registration thereof shall be corrected at the rate of such inaccuracy for any period which is definitely known and agreed upon, but in case the period is not definitely known and agreed upon, then for a period extending back one-half of the time elapsed since the last date of calibration not exceeding, however, sixteen (16) days. Following any test, metering equipment found inaccurate shall immediately be restored as closely as possible to a condition of accuracy. If for any reason meters are out of service and/or out of repair so that the amount of natural gas delivered cannot be ascertained or computed from the reading thereof, the natural gas delivered through the period such meters are out of service and/or out of repair shall, be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) By using the registration of any check meter or meters if installed and accurately registering.

(b) By correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation.

(c) By estimating the quantity of delivery by deliveries during preceding periods under similar conditions when [fol. 29] the meter was registering accurately.

Section 4. The unit of measurement for the natural gas deliverable under this agreement shall be one thousand (1,000) cubic feet of natural gas at a base temperature of sixty (60) degrees Fahrenheit and at a base pressure of eight (8) ounces gauge pressure above fourteen and four-tenths (14.4) pounds absolutely atmospheric pressure and the readings and registrations of the metering equipment herein provided for shall be computed into such units. For the purpose of computation, the natural gas deliverable hereunder shall be assumed to obey Boyle's law and the average absolute atmospheric (barometric) pressure shall be assumed to be fourteen and four-tenths (14.4) pounds to the square inch, irrespective of the actual elevation or location of the delivery point above sea level or of variations in such barometric pressure from time to time. If meters other than the orifice type are used, then in computing the readings and registrations of such metering equipment into the units above specified, the physical characteristics of the natural gas which affect such computations shall be given each their due consideration and the determination of such physical characteristics shall be made by standard apparatus and methods and at such times and places as, in accordance with good practice, may be agreed upon from time to time between Seller and Buyer. For meters of the orifice type, the following factors shall be given due consideration, viz:

(a) The temperature of the natural gas flowing through the meter shall be obtained by the use of a recording thermometer so installed that it may properly record the temperature of the natural gas flowing through the meter. The average hourly temperature recorded each twenty-four (24) hour day shall be used in computing measurements.

(b) The specific gravity of the natural gas shall be determined once monthly by joint test on a day as near the first of the month as practicable or as much oftener as is found necessary in practice. The method of test used shall be by Edward's Balance or by such other method as shall be agreed upon by the parties. The regular test on or near the first of the month shall determine the specific

gravity to be used in computation for the measurement of natural gas deliveries during such calendar month or until changed by special test, the special test to be applicable from the day made and through the following days of such calendar month.

Section 5. Buyer may, at its option, and at its cost and expense, install and operate check metering equipment, but [fol. 30] the metering equipment of Seller shall be used for determining the amounts of natural gas delivered under this agreement. The check metering equipment so installed by Buyer, together with any buildings erected by it for such equipment, shall be and remain its property. Whenever the points of delivery as specified herein are on the premises of Seller, Seller grants to Buyer the right of free use of and ingress and egress to such check metering equipment of Buyer at all times for the purpose of installation, operation, repair and/or removal. The check metering equipment and the method of installation of the same shall be of such standard type for the measurement of natural gas as is approved by both parties hereto, but Buyer shall have the right to replace such equipment at any time with metering equipment of equal grade subject to the approval of Seller as to type and method of installation. In the event check metering equipment is installed by Buyer, Seller shall have access to the same at all reasonable times, but the reading, calibrating and adjusting thereof and the changing of charts shall be done only by employees or agents of Buyer. Charts and records from said check metering equipment shall remain the property of Buyer. Upon request of Seller, Buyer shall submit to Seller records and charts from said check metering equipment, together with calculations therefrom for Seller's inspection and verification subject to return by Seller within ten (10) days after receipt thereof.

Section 6. The separation of the total amount of gas purchased by the Buyer into the respective portions purchased for (a) domestic consumers (b) consumers other than domestic and (c) unaccounted for gas, respectively, referred to in Section 8 hereof, shall for the purposes of payment, be determined as follows:

The Buyer shall on or before the fifth day of each calendar month render a statement to the Seller, showing for the preceding billing month, the quantity of natural gas

consumed by the Buyer's domestic consumers and, separately, for the preceding calendar month, the quantity of natural gas consumed by the several Buyer's consumers other than domestic consumers and each of the latter at the prices applicable hereunder to gas sold to consumer other than domestic consumers. The consumers supplied with natural gas through each point of delivery to Buyer from one of the Seller's metering stations shall be grouped together in a separate statement and dealt with for computation of natural gas deliveries, and the ascertainment of the monthly payments hereunder, separately in one group according to the registrations of each metering station as provided in Section 3 hereof. The quantities consumed by the Buyer's domestic consumers and [fol. 31] other than domestic consumers each month in each separate group shall be paid for by the Buyer to the Seller at the agreed rates hereinafter set forth and on the basis of measurement applied by the Buyer to such consumers; such quantities, however, for the purpose of ascertaining the volume of natural gas delivered for consumers other than domestic consumers in such calendar months shall be computed at a pressure of eight (8) ounces, above fourteen and four-tenths (14.4) pounds average absolute atmospheric (barometric) pressure to the square inch and upon such basis shall be added to the quantity of natural gas shown to have been consumed by the Buyer's domestic consumers and the sum of these two amounts shall be deducted by the Seller from the total amount of natural gas registered in such calendar month by the Seller's metering stations through which the gas is served to Buyer's distributing pipe line system supplying such gas to such group and the remainder so determined shall be considered unaccounted for gas to be paid for as set forth in sub-section (c) of Section 8 hereof.

In these measurements it is agreed that no allowance shall be made for leakage or for failure of the Buyer to collect from any of its consumers, or for the Buyer's allowance to consumers because of defective consumers' meters or meter readings, or for Buyer's allowances to churches, schools, colleges, orphananges, homes for children and charitable institutions maintained by the State, County or City, or by any religious organization, public hospitals and municipal buildings or other similar special disposition, it be-

ing the intention of the parties hereto that all natural gas delivered by the Seller to the Buyer and measured by Seller's measuring stations shall be paid for by the Buyer to the Seller as above stipulated. The Buyer shall read all meters through which it measures natural gas used or sold for other than domestic consumers, as nearly as practicable at four o'clock in the afternoon on the last day of each calendar month and the Seller's meter or meters at the point or points of delivery to Buyer shall be read by Seller for the final reading each month as nearly as practicable at the same hour of such last day of such calendar month.

The Seller shall render to the Buyer on or before the tenth day of each month a statement of the amount of natural gas delivered to the Buyer during the calendar month immediately preceding and of the amount of payment or payments then due from the Buyer to the Seller at the agreed price for the portions of such natural gas used and/or sold for (a) domestic consumers, (b) other than [fol. 32] domestic consumers and (c) unaccounted for gas, at the respective prices set forth in subdivisions (a), (b) and (c) of Section 8 hereof.

Section 7. Seller has heretofore contracted with certain industrial consumers within the State of Alabama for the sale to them of natural gas under certain conditions and at certain prices, which contracts have been assigned by the Seller and assumed by the Buyer. The gas delivered by Seller to the Buyer and resold by the Buyer to such above mentioned industrial consumers and to such other industrial customers as Seller may contract with, and the contracts with which may be likewise assigned to and assumed by Buyer, shall be paid for by the Buyer to the Seller at the same prices as stipulated in said contracts unless otherwise expressly agreed in writing; but this provision shall be in effect only during the initial term of said contracts and shall not obtain during any renewal or extension thereof. The intent of this paragraph is that Seller, having incurred the initial expense and cost of development involved should receive the gross revenue called for by said initial contracts during the initial term thereof.

Section 8. The prices to be paid by the Buyer to the Seller for each one thousand (1,000) cubic feet of natural gas sold and delivered to Buyer hereunder other than for gas

delivered to the industrial consumers mentioned in Section 7 above, shall be as follows, beginning on the day on which deliveries of natural gas shall commence:

(a) For natural gas sold and delivered by Seller to Buyer for distribution and sale to Buyer's domestic consumers:

For the first two (2) years, forty cents (40c) per thousand cubic feet;

For the third year, forty-two cents (42c) per thousand (1,000) cubic feet;

For the fourth years, forty-three cents (43c) per thousand (1,000) cubic feet;

Thereafter during the term of this agreement, forty-five (45c) per thousand (1,000) cubic feet.

(b) For natural gas purchased by the Buyer from the Seller for resale to consumers other than domestic consumers and other than for gas delivered to the industrial consumers mentioned in Section 7 above, in Calhoun, Cherokee, Cleburne, Etowah, Pickens, Shelby, Talladega and Tuscaloosa Counties, eighteen cents (18c) per thousand (1,000) cubic feet base rate; in Blount, Jefferson, St. Clair and Walker Counties, sixteen cents (16c) base rate and to base rate in both cases an amount equal to one-half (½) of the difference between said base rate and the average net rate or price, payable monthly per one thousand (1,000) cubic feet (including therein the total of all charges for service, demand, commodity, minimum or other charges) [fol. 33] by each such consumer to the Buyer.

(c) For all other gas delivered by Seller to Buyer at the point or points of delivery (such other gas referred to in this subsection (c) being herein designated "unaccounted for gas"): For the first three years, twenty-three cents (23c) per thousand (1,000) cubic feet, thereafter during the period of this agreement, twenty-six cents (26c) per thousand (1,000) cubic feet.

Section 9. The Buyer agrees to pay the Seller at its office in Birmingham, Alabama, on or before the 15th day of the month, for said natural gas deliveries of the preceding month according to the natural gas measurements and computations and at the prices hereinbefore provided for and billed on said monthly statement. Should the Buyer fail to

pay any amount due from it to the other party when such amount is due, interest thereon shall accrue at six percent (6%) per annum from the date when such amount was due to the date of payment. If such failure to pay continues for sixty (60) days, then the Seller may discontinue deliveries of natural gas, but the exercise of such right shall be in addition to any and all other remedies otherwise available to the Seller.

Section 10. Each party shall have the right to examine the books, records and charts of the other party to the extent necessary, to verify the accuracy of any statement, charge or computation made pursuant to the provisions of any section hereof.

Section 11. In order to protect Buyer's domestic and industrial customers against loss and injury occasioned by interruption of the supply of natural gas herein contracted for and to insure them continuity of service, Seller hereby covenants and agrees as follows:

(a) To use due diligence and effort to operate in a skillful and methodical manner Seller's main pipe line and pipe lines lateral thereto which may be under Seller's control and to maintain them in good repair and in all respects to fully perform all contracts which Seller may have for the supply from natural gas fields of natural gas deliverable hereunder in order to prevent the lapse or termination of any such contracts for supply.

(b) To use due diligence at all times during the term of this agreement to maintain a reserve supply of natural gas sufficient as to quality and quantity and delivered under pressure adequate fully to meet the needs of all the customers of Buyer hereunder.

In order to equalize, as far as may be practicable, the rates of delivery of gas from Seller to Buyer during days [fol. 34] of maximum delivery and to protect Buyer's domestic and industrial customers against interruption of the supply of natural gas herein contracted for, Buyer covenants and agrees to utilize the gas holders, if any, for its distribution systems in a practical and skillful manner, in so far as their capacity permits to achieve such results.

If the natural gas supplied by the Seller to the Buyer shall average for a period of thirty (30) days a gross

heating value of less than eight hundred (800) B. T. U.'s per cubic foot the Buyer, on giving ten (10) days' written notice to the Seller, shall have the right to suspend taking natural gas hereunder until such time as the Seller is prepared to supply the Buyer with natural gas containing a gross heating value of not less than eight hundred (800) B. T. U.'s per cubic foot. If the Seller shall fail to give the Buyer, within sixty (60) days from the date on which the Buyer gives such notice, written notice that the Seller is taking or causing to be taken such steps as will in the sole opinion of the Seller enable it to resume, within one hundred eighty (180) days after the giving of such notice, the delivery of natural gas containing a gross heating value of not less than eight hundred (800) B. T. U.'s per cubic foot, the Buyer shall have the right to terminate this contract, and all the obligations of both parties hereunder, excepting only the obligation to pay for natural gas already delivered, and if, after having given notice that it is taking or causing to be taken such steps as will in its opinion enable it to deliver natural gas containing a gross heating value of not less than eight hundred (800) B. T. U.'s per cubic foot, the Seller shall fail to resume, within one hundred eighty (180) days after the giving of such notice, the delivery of natural gas containing a gross heating value of not less than eight hundred (800) B. T. U.'s per cubic foot, the Buyer shall then have the right to terminate this contract on not less than thirty (30) days' notice in writing and all the obligations of both parties hereunder excepting only the obligation to pay for natural gas already delivered.

In case of shortage in the supply of natural gas available to Seller for delivery to Buyer hereunder, it is mutually understood and agreed that the requirements of domestic consumers of the Buyers shall be fully supplied from the natural gas delivered hereunder in preference to consumers purchasing natural gas for other than domestic uses (except as to the outstanding industrial contracts transferred by Seller to Buyer during the term fixed thereby, so long as in full force and effect.)

If for any period of time during the term hereof, the [fol. 35] Seller shall be unable or fail to deliver the full amount of natural gas required by the Buyer and deliverable hereunder, then the Buyer shall have the right, during such time as the Seller so fails to furnish the required

amount of natural gas, to purchase or otherwise obtain, at its own expense, natural gas from any available source or manufactured gas to supply such portions of the requirements of its consumers as is not obtainable from the Seller. Any gas manufactured to make up the Buyer's requirements which the Seller is failing to supply shall be deemed to be supplied to domestic consumers to the extent that such domestic consumers actually were supplied by the Buyer and the volume deducted from the current volume for which Buyer is to pay the Seller at the prices set forth in subdivision (a) of Section 8 hereof.

Section 12. The natural gas deliverable hereunder shall be natural gas as produced in its natural state from the wells, except that Seller may extract or permit the extraction of any helium content and the natural gas gasoline from said natural gas. Seller shall not subject said natural gas, nor permit said natural gas to be subjected to any treatment in the extraction of natural gas gasoline or otherwise which shall substantially change the chemical composition of any of the component parts of said natural gas, nor permit or cause the admission of oxygen or of any other substance which will dilute said natural gas.

Section 13. (a) In the event of either party being rendered unable wholly or in part by force majeure to carry out its obligations under this contract other than to make payments of amounts due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegraph to the other party as soon as possible after the occurrence of the cause relied on, then the obligation of the party giving such notice so far as it is affected by such force majeure shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall so far as possible be remedied with all reasonable dispatch. The term "force majeure" as employed in this agreement, shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints from rulers and people, interruptions by government or court orders, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, freezing of wells or lines of [fol. 36] pipe, sudden partial or entire failure of natural

gas wells and any other cause, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to overcome.

(b) Seller may, without liability to Buyer, interrupt its service hereunder for the purpose of making necessary alterations and repairs to its pipe lines and compressor station equipment and machinery, but only for such time as may be reasonable or unavoidable; and Seller shall give to Buyer, except in case of an emergency, reasonable notice of its intention so to do and shall endeavor to arrange such interruptions so as to inconvenience Buyer and the other consumers of Seller as little as possible.

(c) If such interruption or failure of supply of natural gas occur at any point or points where natural gas is deliverable hereunder, Seller will not renew or recommence deliveries of natural gas at such point or points until Seller or its agent in charge of such alteration or repairs has received from Buyer or its agent in charge in the contract area affected written or telegraphic notice that the Buyer is ready and able to accept renewed deliveries of natural gas, provided, however, that Buyer will in all instances give to Seller such written or telegraphic notice of willingness and ability to accept renewed deliveries of natural gas as promptly as possible and not exceeding twelve (12) hours after receipt by Buyer of written or telegraphic notice from Seller of Seller's ability to make such renewed deliveries.

Section 14. Unless otherwise provided, all notices to be given hereunder by Seller to Buyer shall be given by registered mail or by delivering the same to Buyer at its office at Birmingham, Alabama, or any *any* such other office as may be hereafter designated by Buyer in writing for the purpose, and all notices to be given by Buyer to Seller shall be given by registered mail or by delivering the same to Seller at its office at Birmingham, Alabama, or at such other office as may be hereafter designated by Seller in writing for the purpose.

Section 15. As between the parties hereto, Seller shall be in control and possession of its natural gas deliverable hereunder and responsible for any damage or injury caused thereby until the same shall have been delivered to Buyer at

the place of delivery, after which delivery, Buyer shall be deemed to be in exclusive control and possession thereof and responsible for any injury or damage.

[fol. 37] Section 16. This agreement shall be in full force and effect for the term of fifteen (15) years from the day when the delivery of gas begins under the gas purchase contracts referred to in the recitals hereof, which date shall be promptly certified in writing by Seller to Buyer.

Section 17. This agreement shall bind and benefit the successors of the respective parties hereto but shall not be transferred or assigned on their part without the mutual consent of the other party hereto, provided, however, that this agreement and all rights and obligations of either party hereby created may be transferred or assigned by such party without the consent of the other party pursuant to any plan of reorganization, merger and/or consolidation and/or pursuant to the sale, whether by the foreclosure of any mortgage or deed of trust or otherwise, of all or any part of any gas transmission system or of any gas distribution utility properties of such party affected by this agreement.

If all or any part of the proposed pipe line and/or lateral pipe lines of Seller required for the delivery of gas hereunder and/or all or any part of the gas distribution utility properties owned and operated by Buyer hereunder be voluntarily sold or exchanged by the Buyer or Seller hereunder, then and in such event the Buyer and Seller respectively agree that they will cause the person, firm or corporation so acquiring all or any part of such main pipe line, lateral line or gas distribution utility properties to take and hold the same subject to the obligation fully and faithfully to perform all of the obligations created by this agreemetn, applicable to the property so sold or exchanged.

Section 18. Seller warrants generally the title to all gas delivered hereunder and agrees to indemnify Buyer from all suits, actions, debts, accounts, damages, costs, losses and expenses arising from or out of adverse claims of any or all persons to said gas and/or to royalties or charges thereon. Seller agrees to reimburse, indemnify, and hold harmless Buyer from any and all claims of the Federal Government, or any State and/or any governmental subdivision thereof, and/or any other taxing body for and

against the amount of any taxes or charges of whatsoever nature, levied or assessed against Seller, or any corporation associated with or subsidiary to Seller by reason of the ownership, transportation and/or sale of natural gas deliverable hereunder and/or by reason of the receipt by Seller and/or any such affiliated or subsidiary corporation of the purchase price of said natural gas deliverable here-[fol. 38] under and/or by reason of the receipt by Seller and/or any such affiliated or subsidiary corporation of the purchase price of said natural gas payable hereunder.

Section 19. If either party shall fail to perform any of the covenants or obligations imposed upon it under any by virtue of this agreement (unless such failure shall be excused under the provisions of Section 13 hereof) then, and in such event, the other party may at its option terminate this agreement, as to the party in default, by proceeding as follows: The party not in default shall cause a written notice to be served on the party in default, stating specifically the cause for terminating this agreement and declaring it to be the intention of the party giving the notice to terminate the same; thereupon the party in default shall have thirty (30) days after the service of the aforesaid notice in which to remedy or remove the cause stated in the notice for terminating the agreement, and if within said period of thirty (30) days the party in default does so remove and remedy said cause or causes and fully indemnifies the party not in default for any and all consequences of such breach, then such notice shall be withdrawn and this agreement shall continue in full force and effect. In case the party in default does not so remedy and remove the cause or causes and/or does not indemnify the party giving the notice for any and all consequences of such breach, within said period of thirty (30) days, then this agreement shall become null and void from and after the expiration of said period. Any cancellation of the agreement pursuant to the provisions of this paragraph shall be without prejudice to the right of the party not in default to collect any amounts then due to it and without waiver of any other remedy to which the party not in default may be entitled for violation of this agreement.

Section 20. Whenever at any time or times and for as long as the natural gas deliverable hereunder shall not be

in quantity, quality or under pressure sufficient and adequate to meet the requirements of all the customers of all classes of Buyer hereunder, Seller upon the written consent of the Buyer (which consent shall not be unreasonably withheld), shall have the right to secure additional natural gas from fields other than said Monroe and Richland fields and to deliver such natural gas to Buyer hereunder in strict accordance with all the terms and provisions hereof, except that the price of such additional natural gas payable to Seller hereunder shall be such as will fully compensate Seller for all additional costs and expenses therefor and such price, if not agreed to between Seller and Buyer, shall [fol. 39] have the right to secure additional natural gas from fields other than said Monroe and Richland fields and to deliver such natural gas to Buyer hereunder in strict accordance with all the terms and provisions hereof, except that the price of such additional natural gas payable to Seller hereunder shall be such as will fully compensate Seller for all additional costs and expenses therefor and such price, if not agreed to between Seller and Buyer, shall be fixed by a Board of three arbitrators to be selected, who shall function and whose decision shall be binding upon the parties in accordance with the provisions of Section 22 hereof.

Section 21. If in the opinion of counsel for Seller this agreement shall now or hereafter be subject to the jurisdiction of any Public Service Commission and/or other governmental body, or so held by valid and binding order in a proceeding of which Seller shall have due notice, it shall be submitted promptly to said Commission or other body. In the event that upon such submission, or in any other manner, said Public Service Commission and-or other governmental body having lawful jurisdiction in the premises shall by lawful and binding order or decree disapprove of any obligation of Buyer under this agreement, Buyer shall be relieved, provided due effort to renew such order shall have been made, if requested by Seller; to the extent of such disapproval, from its duty to perform said obligation, without liability on the part of the Buyer to Seller or to any other party whatsoever, and Seller shall likewise be relieved, to the extent affected by such disapproval, from its duty to perform said obligation to Buyer, without liability

on the part of Seller to Buyer or to any other party whatsoever.

Section 22. Any dispute arising out of this agreement shall be determined by a Board of three arbitrators to be selected as follows: Either of the parties hereto may, at any time such board of arbitrators is desired by it, notify the other party hereto of the name of an arbitrator, and if such party who first served the notice may on reasonable notice to the other party apply to the person who is the Judge then senior in office of the District Court of the United States of America having jurisdiction of the Southern District of Alabama or any Federal Court of similar jurisdiction in said District for the appointment of such second arbitrator for or on behalf of the other party and in such case the arbitrator appointed by the person who is such Judge shall act as if named by the other party. The two arbitrators chosen as above provided for shall within twenty (20) days after the appointment of the second arbitrator choose the third arbitrator and in the event of their failure so to do within said twenty (20) days, either of the parties hereto may in like manner on reasonable notice to the other party apply to the person who is such Judge for [fol. 40] the appointment of a third arbitrator and in such case the arbitrator appointed by the person who is such Judge shall act as third arbitrator. The Board so constituted shall fix a reasonable time and place for the hearing, at which time each of the parties hereto may submit such evidence as it may see fit. Such Board shall determine the matters submitted to it pursuant to the provisions of this agreement.

The action of a majority of the members of such Board shall govern and their decision in writing shall be final and binding on the parties hereto. Each party shall pay the costs and expenses of the arbitrator selected by or for it and all other costs of the arbitration shall be equally divided between the parties hereto.

Section 23. The term "Domestic consumer", as used herein, is defined to mean all those consumers using gas in domestic service and paying the Buyer's domestic rate, such service including the reasonable use thereof for heating, lighting and cooking in private homes, boarding houses, restaurants, apartment houses or flats, including those using

gas for lighting and cooking only, in hotels, bakeries and stores, and for heating in hotels and buildings where separate rooms are heated by stoves and/or grates.

The term "other than domestic consumers" as used herein, is defined to comprise any other sales, including use for cooking processes in excess of 50,000 cubic feet per month and for heating in central heating plants for office buildings, apartment buildings or flats, factories, stores, churches, hospitals and all other public buildings.

The term "unaccounted for gas" as used herein, is defined to mean the difference between the quantity of gas sold and delivered by Seller to Buyer and the quantity of gas delivered by the Buyer through its pipe lines to its domestic and industrial consumers, including gas consumed by Buyer for its own use.

In Witness Whereof the parties have caused this agreement to be duly signed by their respective officers the day and year first above written.

Southern Natural Gas Corporation, by, H. S. Swan, Vice-President.

Attest: J. J. Wentworth, Assistant Secretary.

Alabama Natural Gas Corporation, by J. H. White, Vice-President.

Attest: Wm. R. Gignilliat, Secretary.

[fol. 41] EXHIBIT "A" TO AGREEMENT

Schedule of Industrial Contracts Referred to in Section 1

Name	Address
Russell Clay Mfg. Co.	Alton, Alabama.
Calera Lime Works	Calera, Alabama.
Keystone Lime Works	Keystone, Alabama.
Bessemer Galvanizing Co.	Bessemer, Alabama.
Stephenson Brick Co.	Lovick, Alabama.
Stephenson Brick Co.	Cordova, Alabama.
Birmingham Clay Products Co.	Sibleyville, Alabama.
Birmingham Clay Products Co.	Sayreton, Alabama.
Superior Lime Co.	Pelham, Alahama.
Southern Clay Mfg. Co.	Lewisburg, Alabama.

EXHIBIT "A" TO AGREEMENT—Continued

Name	Address
Southern Clay Mfg. Co.	Coaldale, Alabama.
Cheney Lime Company	Landmark, Alabama.
Newala Lime Works	Newala, Alabama.
Alabama Lime & Stone Co.	Vernon, Alabama.
Alabama Lime & Stone Co.	Calera, Alabama.
Watkins Brick Co.	Ensley, Alabama.
Saginaw Lime & Stone Co.	Saginaw, Alabama.
Alphons Custodis Chimney Constr. Co.	Ragland, Alabama.
Alabaster Lime & Stone Co.	Alabaster, Alabama.

[fol. 42] EXHIBIT "B" TO AGREED STATEMENT OF FACTS

Agreement Between Tennessee Coal, Iron & Railroad Co. and Southern Natural Gas Corporation

January 30, 1930.

This Agreement made and entered into this 30th day of January, 1930, by and between Southern Natural Gas Corporation, a corporation duly created, organized and existing under and by virtue of the laws of the State of Delaware (hereinafter called "Seller") party of the first part and Tennessee Coal, Iron & Railroad Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Tennessee (hereinafter called "Buyer") party of the second part.

Witnesseth:

Whereas, Seller desires to sell and deliver to Buyer and Buyer desires to purchase and receive from Seller natural gas hereinafter provided; and,

Whereas, Seller has now under construction a natural gas pipe line from the Monroe and Richland gas fields in the State of Louisiana into the States of Mississippi, Alabama and Georgia;

Now, Therefore, This Agreement Witnesseth that the parties hereto, in consideration of the covenants and payments herein set forth and of the sum of One Dollar ($1) in hand paid by each to the other, the receipt of which is hereby acknowledged, have mutually covenanted and agreed and do hereby mutually covenant and agree as follows:

First. Seller agrees at its expense to lay, construct and during the term of this agreement to maintain and operate

a pipe line system including an adequate number of compressor stations for conveying gas from said Monroe and Richland gas fields or its equivalent into and across the State of Mississippi and into the Alabama plants of Buyer hereinafter described.

Seller agrees to complete said line to the delivery points hereinafter described and to begin making deliveries of gas hereunder in quantity and quality and under pressure as hereinafter specified on or before March 1, 1930, and Buyer agrees to receive and pay for the amounts of gas thereafter delivered during the life of this contract and measured under the terms and conditions hereinafter set forth.

Second. Seller shall supply and Buyer agrees to take natural gas for use in its Bessemer Rolling Mill, its Fairfield Ala. Plant and Ensley, Ala. Plant (with the option to discontinue its use in the Ensley Plant as hereinafter set [fol. 43] forth) and for resale, for industrial use only, to other subsidiaries of the United States Steel Corporation in the Birmingham District to replace all fuel used in the above named plants of Buyer and plants of the other subsidiaries of the United States Steel Corporation (except and to the extent that Buyer may elect to use or supply such subsidiaries with its own by-products) and excepting the fuel burned under the Buyer's boilers and the boilers of the other subsidiaries; also excepting from such requirements at the option of Buyer fuel oil for use in emergencies due to shortage of natural gas and fuel used in any of the plants for small miscellaneous purposes. Under this agreement, the Buyer shall not be prevented from buying or exchanging and using fuel oil when and if the Seller is unable to supply natural gas to meet the requirements of the Buyer.

Seller shall at its own expense provide in advance of the initial delivery date of March 1, 1930, service lines of suitable size to a point mutually agreed upon on the property of Buyer's Bessemer plant. To reach Buyer's Fairfield Plant Seller shall provide a service line that will cross Buyer's Ensley property and run in a southwesterly direction on the property of Buyer to some point mutually agreed upon, on Buyer's Fairfield premises. Buyer agrees that it will make no charge for right of way for any part of the service lines traversing its property. A suitable

meter will be provided for metering gas that may be used in the Bessemer plant, in the Ensley plant and in the Fairfield plant of the Buyer and the plants of other subsidiary companies.

Seller shall provide main line capacity for Buyer's present estimated maximum requirements of 10,589,600 cubic feet per day of twenty-four (24) hours which maximum capacity if utilized under a normal operation of twenty-six (26) days per month should provide capacity for the delivery of 275,329,000 cubic feet per month for the Buyer's use. Seller agrees that upon reasonable notice it will provide increased capacity in its main lines for additional requirements of Buyer, but not in any event in excess of 15,596,100 cuvic feet per day without the agreement in writing of Seller. The present estimated daily maximum of 10,589,600 cubic feet shall be the "reserve capacity" for determining "surplus gas" within the meaning of paragraph Third hereof unless and until changed by notice in writing reserving a different maximum. Seller shall be under no obligation to deliver gas on any day in excess of the daily current reserved maximum capacity.

Buyer reserves the right to discontinue upon reasonable notice the use of natural gas as a substitute for producer gas in the No. 1 Open Hearth plant at Ensley, when and if such use of natural gas proves unsatisfactory as related to cost and other metallurgical uses. If Buyer discontinues [fol. 44] use of natural gas in this plant, pipe line capacity shall no longer be reserved therefor.

The above requirements of natural gas to meet the needs of Buyer are to be supplied by Seller and taken by Buyer under the following terms and conditions:

Third. For the volume of gas taken for all uses (except the replacement of producer gas at the No. 1 Ensley Open Hearth plant and surplus gas) computed as provided in paragraph Five hereof, Buyer shall pay monthly as provided in paragraph Nine hereof at the following schedule No. 1:

Schedule No. 1

First 1,000,000 cu. ft. per month @ 25c per M. C. F.
Next 9,000,000 cu. ft. per month @ 20c per M. C. F.
Next 121,000,000 cu. ft. per month @ 19c per M. C. F.
All over 131,000,000 cu. ft. per month @ 17c per M. C. F.

Gas to be paid for under Schedule No. 2 below is not to be included in computing the above quantities.

Schedule No. 2

For natural gas used in the No. 1 Open Hearth plant at Ensley, the price shall be 17c per M. C. F.

Schedule No. 3

For surplus natural gas used in any plant, the price paid shall be 17c. Surplus gas is any gas for which pipe line capacity has not been reserved, but the surplus gas price shall not apply thereto unless the total amount of gas taken under Schedule No. 1 in the calendar month in question exceeds the limit of 131,000,000 cu. ft. for the operation of the present existing facilities, which limit shall be increased to include the estimated requirements of new plants, or additions to or additional requirements of existing plants (for which additional line capacity shall be reserved by Buyer or if not so reserved shall be fairly estimated and added to said limit) but in no case shall the limit exceed 150,000,000 cubic feet per month.

The supply of natural gas deliverable hereunder, except surplus gas, shall be subject only to—

(a) interruptions of service by causes beyond control of Seller and present or future laws, rules and regulations of such governmental authorities as may have jurisdiction of Sellers business.

(b) the priority of gas required to be delivered to Southern Cities Public Service Company under its agreement with Seller dated March 29, 1929.

(c) temporary curtailment of delivery in time of short- [fol. 45] age of gas due to extreme demand of domestic consumers at which time gas deliverable hereunder shall be prorated with all other gas sold to industrial consumers subject only to the priority in (b) above.

For additional fuel requirements of present plants or new plants constructed or additions to existing plants made during the life of this agreement main pipe line capacity may be reserved by Buyer as herein provided up to a maximum of 5,006,500 cubic feet per day in addition to the present maximum reserved under paragraph Second.

Fourth. The natural gas shall be delivered at a pressure of not less than 30 pounds gauge at some mutually satisfactory location or locations upon the premises of Buyer, and Seller shall there furnish, install, operate and maintain at its own expense regulating and measuring station or stations properly equipped with orifice meters and recording gauges or other type of meter or meters of standard style as may be mutually agreed upon conformable to the current recommendations of Gas Measurements Committee of American Gas Association, the measurement by which shall fix the total amount of natural gas delivered by Seller to Buyer.

The measuring equipment so installed by Seller, together with any building erected by it for such equipment, shall be and remain its property. Buyer shall have access to said metering equipment at all reasonable times but the reading, calibrating and adjusting thereof and changing of charts shall be done only by the employes or agents of Seller. Charts and records from such metering equipment shall remain the property of Seller. Upon request of Buyer, Seller will submit to Buyer records and charts from its metering equipment, together with calculation therefrom for Buyer's inspection and verification, subject to return by Buyer, within ten (10) days after receipt thereof, after which return the charts and records shall be kept on file by Seller for the mutual use of both parties.

The Junkers type of calorimeter for measurement of the heating value of the gas as hereinafter prescribed shall be furnished by the Seller and remain its property. It shall be installed and maintained by the Buyer.

At least twice each month, and on dates as near the first and sixteenth of the month as practicable, Seller shall calibrate its meters in the presence of representatives of Buyer and the parties shall jointly observe any adjustments which are made in the meters should such adjustments be necessary, and, if the check meters hereinafter provided for have been installed, the same shall also be calibrated by Buyer in the presence of representatives of Seller and any adjustments jointly observed should such adjustments be necessary. If either party at any time desires a test of any meter or if either party at any time observes a variation [fol. 46] between the delivery meter and its check meter, if any such check meter is installed, it will promptly notify

the other party and the parties will then cooperate to secure an immediate calibration test and joint observation of any adjustments and the meter shall then be adjusted to accuracy and corrections jointly made for the monthly settlements. Each company shall give to the other company notice of the time of all tests of meters sufficiently in advance of the holding of the tests so that the other company may conveniently have its representatives present.

If, upon any test, any metering equipment is found to be inaccurate by two percent (2%) or more, registrations thereof shall be corrected at the rate of such inaccuracy for any period which is definitely known and agreed upon, but in case the period is not definitely known and agreed upon, then for a period extending back one-half (½) of the time elapsed since the last date of calibration not exceeding, however, eight (8) days. Following any test, metering equipment found inaccurate shall immediately be restored as closely as possible to a condition of accuracy. If for any reason meters are out of service and/or out of repair so that the amount of natural gas delivered cannot be ascertained or computed from the reading thereof, the natural gas delivered through the period such meters are out of service and/or out of repair shall be estimated and agreed upon by the parties hereto upon the basis of the best data available, using the first of the following methods which is feasible:

(a) by using the registration of any check meter or meters if installed and accurately registering.

(b) by correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation.

(c) by estimating the quantity of delivery by deliveries during preceding periods under similar conditions when the meter was registering accurately.

Fifth. The unit of measurement for the natural gas deliverable under agreement shall be one thousand (1,000) cubic feet of natural gas at a base temperature of sixty (60) degrees Fahrenheit and on a base pressure of eight (8) ounces gauge pressure above fourteen and four-tenths (14.4) pounds absolute atmospheric pressure and the readings and registrations of the metering equipment herein

provided for shall be computed into such units. For the purpose of measurement, the natural gas deliverable hereunder shall be assumed to obey Boyle's Law and the average absolute atmospheric (barometer) pressure shall be assumed to be fourteen and four-tenths (14.4) pounds to the square inch irrespective of the actual elevation or location of the delivery points above sea level or of variations in [fol. 47] such barometric pressure from time to time. If meters other than the orifice type are used, then in computing the readings and registrations of such metering equipment into the units above described the physical characteristics of the natural gas which affects such computations shall be given each their due consideration and the determination of such physical characteristics shall be made by standard apparatus and methods and at such times and places as, in accordance with good practice, may be agreed upon from time to time between Seller and Buyer. For meters of the orifice type the following factors shall be given due consideration, viz:

(a) The temperature of the natural gas flowing through the meter shall be obtained by the use of a recording thermometer, so installed that it may properly record the temperature of the natural gas flowing through the meter. The weighted average temperature recorded each twenty-four hour day shall be used in computing measurements. (b) The specific gravity of the natural gas shall be determined twice monthly by joint tests on days as near the first (1st) and sixteenth (16th) of the month as practicable, or as much oftener as is found necessary in practice. The method of test used shall be by Edward's Balance, or by such other method as shall be agreed upon by the parties. The regular test at the first (1st) of the month shall determine the specific gravity to be used in computations for the measurement of natural gas deliveries during the first fifteen (15) days of such calendar month or until changed by special test, the special test to be applicable from the day made and through the following days to and including the fifteenth (15th) day of such calendar month. The regular test made on the sixteenth (16th) of the month shall determine the specific gravity to be used in computations for the measurement of natural gas deliveries in that part of such calendar month commencing with the sixteenth (16th) day and continuing until the end thereof or until changed by

special test, the special test to be applicable from the day made through the remaining days in such calendar month.

Sixth. Buyer may at its option, and at its cost and expense, install and operate check metering equipment, but the metering equipment of the Seller shall be used for determining the amounts of natural gas delivered under this agreement. The check metering equipment so installed by the Buyer, together with any buildings erected by it for such equipment, shall be and remain its property. The check metering equipment and the method of installation of the same shall be of such standard type for the measurement of natural gas as is approved by both companies. Buyer shall have the right to replace such equipment at any time with metering equipment of equal grade subject [fol. 48] to the approval of Seller as to type and method of installation. In the event check metering equipment is installed by Buyer, Seller shall have access to the same at all reasonable times, but the reading, calibrating and adjusting thereof, and the changing of charts shall be done only by employes or agents of Buyer. Charts and records of said check metering equipment shall remain the property of Buyer. Upon request of Seller, Buyer will submit to Seller records and charts from said metering equipment, together with calculations therefrom for Seller's inspection and verification, subject to return by Seller within ten (10) days after receipt thereof.

Seventh. Seller shall render to Buyer, on or before the fifth (5th) day of each month, a statement of the amount of natural gas delivered to Buyer during the calendar month immediately preceding and of the amount of payment or payments then due from Buyer to Seller therefor. The statements of deliveries so furnished by Seller to Buyer shall be conclusive upon the parties excepting as to the corrections and/or adjustments pending unless exceptions thereto in writing shall be made by Buyer within ten (10) days after it shall receive such statement.

Eighth. The gas deliverable hereunder shall be merchantable natural gas as produced or purchased by Seller, except that Seller shall have the right to extract the natural gasoline and helium content from all natural gas deliverable hereunder, but not otherwise to modify the thermal value of the natural gas. It is agreed that the price to be paid by

Buyer hereunder for the gas delivered is based upon a gross heat unit content of 980 B. T. U. per cubic foot of dry gas measured at a pressure of eight ounces above 14.4 pounds atmospheric pressure at a temperature of 60 degrees Fahrenheit. In the event that the gross heat unit content of the gas furnished hereunder shall for any calendar month fall below 980 B. T. U. per cubic foot at a measured pressure of eight ounces above 14.4 pounds atmospheric pressure, at a temperature of 60 degrees Fahrenheit, it is agreed that the price payable by Buyer for gas hereunder shall in such event be reduced in the proportion that actual heating value as determined hereunder bears to 980. Likewise if for any calendar month the gross heat unit content of the gas furnished hereunder exceeds 980 B. T. U. per cubic foot at the measured pressured of eight ounces above 14.4 pounds atmospheric pressure and a temperature of 60 degrees Fahrenheit, it is agreed that the price payable by Buyer for gas hereunder shall in such event be increased in the proportion that the actual heating value determined bears to 980. If the average gross heat unit content of the natural gas to be supplied hereunder shall for any period of thirty (30) days average less than 900 B. T. U., the Buyer shall have the right, upon sixty days' notice, to cancel this agreement.

[fol. 49] The determination of the B.T.U. content of all the natural gas deliverable hereunder shall be made by the use of the Junkers type calorimeter hereinbefore mentioned and installed on the premises of the Buyer at some point mutually agreed upon. Joint tests of the gas shall be made twice each week, each test to comprise the running of three samples of gas and the average of the B.T.U.'s of the three samples shall constitute the results of each test. The calorimeter shall be operated under the specifications and instructions currently issued by the United States Bureau of Standards. The B.T.U. determined in this manner shall be applied to the gas delivered during the one-half week preceding each test, and the weighted average B.T.U.'s determined by the semi-weekly tests shall be considered as the average B.T.U.'s in the natural gas delivered during the month.

Ninth. Buyer agrees to pay Seller for natural gas delivered hereunder, beginning with date upon which deliveries of gas shall first be made, payment to be made at the office

of Seller, Watts Building, Birmingham, Alabama, on or before the fifteenth (15) of the month for said natural gas deliveries of the preceding month according to the natural gas measurements and computations, and at the prices hereinbefore provided for and billed on said monthly statement.

Tenth. In the event of either party being rendered unable wholly or in part by force majeure to carry out its obligations under this contract other than to make payments of amounts due hereunder, it is agreed that on such party giving notice and full particulars of such force majeure in writing or by telegram, to the other party as soon as possible after the occurrence of the cause relied on, then the obligation of the party giving such notice so far as it is affected by such force majeure shall be suspended during the continuance of any inability so caused but for no longer period, and such cause shall so far as possible be remedied with all reasonable dispatch. The term "force majeure" as employed in this agreement, shall mean acts of God, strikes, lockouts, or other industrial disturbances, acts of the public enemy, wars, blockades, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraint from rulers and people, interruptions by government or court orders, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, freezing of wells, or lines of pipe, sudden, partial or entire failure of natural gas wells, and any other cause, whether of the kind herein enumerated or otherwise, not within the control of the party claiming suspension, and which, by the exercise of due diligence, such party is unable to foresee, prevent or overcome.

Buyer agrees that Seller may interrupt service hereunder for the purpose of making necessary alterations to [fol. 50] pipe lines and compressor stations and connections, but only for such time as may be reasonable and unavoidable, and Seller shall give priority to the gas required to be delivered by Seller to Southern Cities Public Service Company under its agreement dated March 29, 1929.

Buyer agrees that the delivery of natural gas hereunder shall also be subject to temporary curtailment in cases of temporary shortages of gas due to extreme demand of domestic consumers, at which times and under which conditions gas deliverable hereunder shall be prorated with

all other gas sold to industrial consumers subject only to the prior agreement with the Southern Cities Public Service Company referred to.

Eleventh. This contract shall continue for a period of three (3) years from March 1, 1930, with the privilege to Buyer of renewal for two (2) years upon six (6) months' notice in writing.

The schedule of charge for natural gas for the two (2) years beginning March 1, 1933, if Buyer elects to renew, shall be the schedule of charge for the first three (3) year period plus the increase in the field cost of gas to Seller, but in no event shall the increase in price applicable to Buyer exceed two (2) cents per M. C. F.

Twelfth. Seller shall have the right to assign and transfer its right and the performance of its obligation hereunder to another corporation, provided that Seller shall guarantee the full performance by such transferee of all of the obligations of Seller hereunder.

Seller shall and does hereby guarantee that if such performance or if deliveries hereunder shall be made by such assigns or by any other person or corporation under circumstances requiring approval by any public authority, Seller will forthwith secure approval by such public authority, or if not, or in any other event, Seller guarantees that it will reimburse currently to Buyer any and all excess in the price lawfully required in any such event to be paid by Buyer over and above the prices hereby fixed.

In Witness Whereof, the parties hereof have caused this agreement to be duly signed by representative officers, the day and year first above written.

Southern Natural Gas Corporation, by J. H. White, President.

Attest: Wm. R. Gignilliat, Secretary.

Tennessee Coal Iron & Railroad Co., by Geo. G. Crawford, President.

Attest: L. T. Beecher, Secretary.

[fol. 51] In Circuit Court of Montgomery County

[Title omitted]

Order of Submission

This cause coming on to be heard, is submitted for final decree upon pleadings and proof as noted by the Register.

Walter B. Jones, Judge.

March 20, 1936.

In Circuit Court of Montgomery County

[Title omitted]

Note of Testimony—Filed February 20, 1936

Complainant, being called, offers the following testimony, to-wit:

1st. Appeal from final assessment of State Tax Commission.

2nd. Agreed statement of facts filed May 18th, 1935, with exhibits thereto.

Defendant, being also called, offers the following testimony, to-wit:

1st. Transcript of proceedings of State Tax Commission.

2nd. Agreed statement of facts with exhibits thereto filed May 18, 1935.

I hereby certify that the above Note of Testimony is correct, this 20th day of February, A. D., 1936.

Geo. H. Jones, Jr., Register.

In Circuit Court of Montgomery County, Alabama

In Equity

Southern Natural Gas Corporation

vs.

State Tax Commission of Alabama

Decree Setting Aside Final Assessment of State Tax Commission—Filed February 20, 1936

This cause coming on to be heard on appeal by Southern *National* Gas Corporation from the final assessment made

by the State Tax Commission of Alabama assessing a franchise tax against the appellant for the year 1931 in the sum of $10,000, was submitted for decree by stipulation upon the agreed statement of facts filed herein together with the exhibits attached thereto, and the court having [fol. 52] considered the facts and the briefs of counsel for the respective parties finds that during the entire year 1931 Southern Natural Gas Corporation was engaged only in interstate commerce within the State of Alabama or in acts accessorial thereto not subject to franchise taxation by the State of Alabama, and that the assessment of a franchise tax for the year 1931 against Southern Natural Gas Corporation based upon or in respect to its capital employed in such commerce was and is in its entirety a direct burden upon interstate commerce, in violation of the Constitution of the United States and should be annulled.

The court further finds that the capital employed by appellant in Alabama during 1931 and made the basis of the assessment did not constitute capital employed in intrastate business by Southern Natural Gas Corporation within the State of Alabama, within the purview of Section 232 of the Constitution of Alabama and was not authorized to be made the basis of the assessment of a franchise tax against appellant by Sec. 54 of Act No. 163, approved July 22, 1927 (Acts 1927, p. 139. 176).

It is, therefore, Ordered, Adjudged and Decreed that the final assessment made by the State Tax Commission of Alabama, dated May 13, 1931 purporting to assess a franchise tax against Southern Natural Gas Corporation for the year 1931 is hereby set aside and annulled and it is adjudged, ordered and decreed that no franchise tax was assessable against appellant for said year.

Given this 20 day of February, 1936.

Walter B. Jones, Circuit Judge, In Equity Sitting.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

NOTICE OF APPEAL—Filed March 10, 1936

Comes the State of Alabama in the above styled cause and hereby appeals to the Supreme Court of Alabama from the final decree rendered herein.

State of Alabama, by A. A. Carmichael, Attorney General; Frontis H. Moore, Assistant Attorney General.

[fol. 53] [Title omitted]

ACCEPTANCE OF SERVICE OF NOTICE OF APPEAL

Notice of foregoing appeal is hereby accepted and service of notice thereof by the Sheriff is waived.

This 22nd day of February, 1936.

Southern Natural Gas Corporation, by Cabaniss & Johnston, Its Attorneys.

[File endorsement omitted.]

IN CIRCUIT COURT OF MONTGOMERY COUNTY

[Title omitted]

CERTIFICATE OF APPEAL

I, Geo. H. Jones, Jr., Register of the Circuit Court of Montgomery County, Alabama, in Equity, do hereby certify that an appeal was taken in the above stated cause on the 10th day of March, 1936, by the defendant, State of Alabama, from a decree rendered in said cause on the 20th day of February, 1936, to the Supreme Court of the State of Alabama, and that said appeal is made returnable to the second Monday in May, 1936.

Given under my hand and seal of office, this the 10th day of March, 1936.

Geo. H. Jones, Jr., Register of the Circuit Court of Montgomery County, In Equity.

[fol. 54] Register's certificate to foregoing transcript omitted in printing.

[fol. 55] IN SUPREME COURT OF ALABAMA

STATE OF ALABAMA, Appellant,

vs.

SOUTHERN NATURAL GAS CORPORATION, Appellee

ASSIGNMENT OF ERRORS

Comes the appellant in the above styled cause and assigns the following errors appearing in the transcript of the record of the Court below and for grounds thereof says:

1. For that the Court below erred in and by its final decree in holding that appellee was not liable for the franchise tax assessed by the State Tax Commission. (Tr. p. 47 and 48.)

2. For that the Court below erred in and by its final decree in holding that appellee was engaged only in interstate commerce within the State of Alabama or in acts accessional thereto not subject to franchise taxation by the State of Alabama. (Tr. p. 47, 48.)

3. For that the Court below erred in holding in and by final decree in holding that the assessment of franchise tax by the State Tax Commission under the facts set out constituted a direct burden on interstate commerce in violation of the Constitution of the United States. (Tr. p. 47-48.)

4. For that the Court below erred in and by its final decree in holding that the capital employed by appellee in the State of Alabama did not constitute capital employed in Alabama within the purview of Section 232 of the Constitution of Alabama and Section 54 of Act No. 163, approved July 22, 1927. (Gen. Acts 1927, p. 176.) (Tr. p. 47-48.)

5. For that the Court below erred in not holding that the franchise tax required to be levied by Section 232 and levied by Act # 163, approved July 22, 1927, was not levied on the privilege of doing business in the State of Alabama,

and hence under the facts in not holding appellee subject to the franchise tax assessed against it. (Tr. 47-48.)

6. For that the Court below erred in and by its final decree in not holding that the franchise tax levied by the Constitution of Alabama is levied on the privilege of exercising corporate functions in Alabama and in not holding that as the appellee had sought and acquired such privilege, it [fol. 56] was subject to the franchise tax assessed. (Tr. p. 47-48.)

7. For that the Court below erred in and by its final decree in not holding that the appellee was exercising corporate functions in Alabama and subject to franchise tax. (Tr. p. 47-48.)

8. For that the Court below erred in holding that the appellee was engaged only in interstate commerce in Alabama. (Tr. p. 47-48.)

9. For that the Court below erred in and by its final decree in not holding that appellee was subject to the franchise tax assessed by the State Tax Commission.

10. For that the Court below erred in and by its final decree in setting aside and holding for naught the assessment for franchise tax made against appellee by the State Tax Commission.

Wherefore appellant moves this Court to reverse said decree and render a decree holding appellee liable for the franchise tax and reinstating the assessment therefor.

State of Alabama, by A. A. Carmichael, Attorney General; Frontis H. Moore, Assistant Attorney General.

To Southern Natural Gas Corporation, Appellee. To Cabaniss and Johnston, its attorney.

You will take notice of the foregoing assignment of errors.

State of Alabama, by A. A. Carmichael, Attorney General; Frontis H. Moore, Assistant Attorney General.

[fol. 57] IN SUPREME COURT OF ALABAMA

[Title omitted]

ORDER OF SUBMISSION—April 30, 1936

Come the parties by attorneys, and argue and submit this cause for decision.

[fol. 58] IN SUPREME COURT OF ALABAMA, OCTOBER TERM, 1935-36

3 Div. 173.

STATE OF ALABAMA

v.

SOUTHERN NATURAL GAS CORPORATION

Appeal from Montgomery Circuit Court. In Equity.

OPINION

Opinion Rendered June 11, 1936 and Opinion on Rehearing Rendered Oct. 15, 1936

THOMAS JUSTICE

The appeal to the Circuit Court was from an assessment made by the State Tax Commission. — General Acts 1927, page 181, § 66.

The insistence was that the items included in the computation of the assessment did not constitute capital employed in intrastate business within the State of Alabama and within the purview of § 232 of the Constitution of Alabama. The franchise tax for the year 1931, as provided by the [fol. 59] Revenue Act of 1927 [General Acts 1927, page 176, §54], was fixed by the State Tax Commission at $15,047.43, based upon capital employed in Alabama, found to amount to $5,523,715.00.

The submission for decision by the Circuit Court was upon an agreed statement of facts; the decision was for that appellant and the State appealed to this court for a review of the adverse ruling of the Circuit Court. The agreed statement of facts is aided by exhibits which illus-

trate that pleading and are to be considered in testing the correctness of the judgment rendered, as a part of the statement of facts.—Grimsley v. First Ave. Coal & Lumber Co., 217 Ala. 159, 115 So. 90.

The record shows that appellee is a Delaware Corporation qualified to do business in this State. Its original and amended charter was filed in its qualification under §232 of the Constitution of Alabama. Its corporate powers are enumerated as follows:

"The charter in brief authorized it to store, transport, buy and sell, oil, gas, salt, bring, and other mineral solutions; to manufacture, acquire, distribute, use and sell artificial gas and to acquire, produce, use and sell the by-products and the residual products therefrom, and construct, maintain, operate, etc., all works necessary; to mine, produce, buy, acquire, use, sell, and distribute natural gas and its by-products and to acquire all works, equipment, and appurtenances necessary therefor; to produce, generate, buy, use and sell a mixture of artificial and natural gas to distribute the same and to construct such ways and works as necessary therefor; to construct, lay, purchase, acquire, maintain, and operate, sell, encumber or otherwise dispose of all necessary pipe lines, gas mains, plants and systems, for the use, sale and distribution of gas, over or under streets, alleys, etc., through private property and to acquire the same by eminent domain; to acquire, manufacture and deal in ice. Also an elaborate enumeration of powers connected with and incidental to the foregoing businesses including the right to sell stocks, bonds, etc."

* * * * * * *

[fol. 60] "From the date of the qualification of the Southern Natural Gas Corporation through and including the date of the assessment appealed from, the Corporation *had been qualified to do business as a corporation in the State of Alabama and has had the right to use and enjoy all the powers as authorized by its charter; that it paid a permit fee annually and annually secured the right to do whatsoever it was legally authorized to do in the State of Alabama.* [Italics supplied.]

"At the time of the assessment the corporation maintained its office and chief place of business in the City of Birmingham, Alabama; a majority of orders for gas were

received by and cleared through the Birmingham office; all collections for sales were received and disbursements for expenses made or authorized at said office; that the entire management, control and conduct of the business was conducted from said office; the corporation owned and operated automobiles and motor trucks which were used in the maintenance of its pipe lines; the corporation maintains a bank account and has offices and office equipment in Birmingham; the contract under which gas is supplied by the corporation to the Birmingham Gas Company was made and approved in Birmingham; the contract with the Alabama Utilities Service Company was made and executed by the officers of the corporation in Atlanta, Georgia, and the contract under which gas is supplied to the Tennessee Coal, Iron and Railroad Company was made and executed by the officers of the corporation in the City of New York.

"That the subsidiary of the United States Steel Corporation hereinafter referred to is principally the Tennessee Coal, Iron and Railroad Company and other affiliated companies operating steel and industrial plants in the Birmingham district and which are not public utilities but which consume the gas in their own right.

"That the sales to the Tennessee Company and its affiliates are made from time to time upon orders given by the Birmingham office as the needs of such purchasers require; that the gas purchased by these companies is transported into the State through the high pressure transmission system of Southern Natural Gas Corporation, which is made up of the main high pressure line and its numerous laterals, which deliver natural gas to its various customers at the border line of their premises; that in the sales to the Tennessee Company and its affiliates the pressure is reduced at the point of delivery for the accommodation of the purchaser to meet their needs and requirements. The exact quantities of gas required by the corporation's customers in the State are purchased by the corporation from the producers in the Louisiana and Mississippi fields each day."

[fol. 61] The agreed statement of facts further recites:

"Beginning in, to-wit, May, 1929, appellant began the construction of its pipe line for the transmission of natural gas as aforesaid, and by January 1, 1931, appellant had constructed its main lines from the Louisiana fields to At-

lanta, Georgia, and Columbus, Georgia, the Columbus line turning South from the Atlanta line at a point near Tuscaloosa, Alabama.

"Appellant has from the outset made use of said transmission line solely for the purpose of transmitting natural gas, originally from the natural gas fields known as the Monroe field and the Richland field in northeast Louisiana, and subsequently (beginning in the Spring of 1931) including a small proportion of gas from the natural gas fields in the vicinity of Jackson, Mississippi.

"Since organization, appellant's business had been the transmission of said gas from the Louisiana and Mississippi fields above-mentioned for sale in the several states mentioned, other than the State of Louisiana, in which no sales were made."

Its contracts for sales are thus stated:

"On January 1, 1931, and thereafter up to and beyond May 13, 1931 (the date of the final assessment herein appealed from), appellant entered into and held no contract for the delivery of natural gas to any person, firm or corporation within the State of Alabama, except to the following corporations, viz.:

"(a) Alabama Natural Gas Corporation, This corporation was not a consumer of gas. It was throughout the year 1931 and prior thereto engaged in the distribution of natural gas purchased from appellant, said Alabama Natural Gas Corporation being a public utility doing business in Alabama in intrastate commerce and subject to regulation by the Alabama Public Service Commission.

"A copy of the contract with Alabama Natural Gas Corporation is hereto attached marked Exhibit A and made a part hereof.

"(b) Southern Cities Public Service Company, a holding company which entered into contract with appellant for the supply of the subsidiary distributing companies of Southern Cities Public Service Company, doing business as public utilities in the State of Alabama, viz.: Alabama Utilities Service Company, Tri-Cities Gas Company, and Mobile Gas Company. None of said corporations were consumers of gas. All were and are distributors.

[fol. 62] "(c) Birmingham Gas Company and subsidiary or affiliated company (Industrial Gas Corporation), both utilities or distributing companies and not consumers.

"(d) Subsidiaries of the United States Steel Corporation, viz.: Tennessee Coal, Iron & Railroad Company and Universal-Atlas Cement Company, which purchased gas at their respective meter stations and distributed same by thei rown lines to their several points of operation.

"A copy of the contract with the Tennessee Coal, Iron and Railroad Company is hereto attached marked Exhibit 'B' and made a part hereof."

The delivery of gas is declared to have been made by appellant to all of said purchasers under the following conditions:

"The gas sold to the said purchasers was gas delivered in continuous movement from the gas fields in Louisiana or Mississippi without break or interruption, to the point where it was delivered to and received by the purchaser, viz.: the meter house at which the gas so sold was measured for the purpose of payment.

"In cases of all deliveries made by appellant, the gas was moved under unregulated gas pressure, as produced by the natural pressure of the gas wells, to the designated points of delivery; in all cases in continuous flow from the Louisiana or Mississippi gas fields without cessation from the beginning of movement outside of the State of Alabama until delivery."

The industrial activities of the company as affecting its future deliveries are thus indicated:

"The foregoing statement is correct as of January 1, 1931, the accrual date of the tax assessed for such year and upon which this appeal is based. The Company had at that time in course of construction pumping, stepping up or compressor stations in the State of Alabama for the purpose of increasing or regulating the pressure and flow of such gas and from time to time have utilized such equipment since its completion.

"During the year 1931, appellant transacted and proposed to transact no business within the State of Alabama

other than the business of selling, transmitting and delivering gas as aforesaid and in the manner hereinbefore set out or business incidental to or directly accessorial to such sale, transmission and delivery, and had no property in the State except as herein stated, used in said business."

[fol. 63] Appellants holdings on January 1, 1931, and during 1931, were "approximately 564 miles of pipe of varying diameter, and various items of real and personal property, located within the State of Alabama, all constituting part of its said general transmission line system and used and held for use in said business."

The agreement of value declared that "In the event • • • it should be lawfully held in this proceeding that all of appellant's property and assets located within the State of Alabama are to be held to constitute capital employed by appellant within the State of Alabama in the transaction of local business, with respect to which appellant was on the date of the assessment herein appealed from, subject to the assessment of a franchise tax as a foreign corporation transacting local business within the State of Alabama, it is agreed (solely for the purpose of this hearing) that the value of said property as of January 1 to May 13, 1931, was $5,500,000.00, appellant contending, however, that the facts above set out do not constitute the transaction of any local business whatsoever within the State subjecting appellant to a franchise tax under the laws of Alabama in respect thereof, also that, even if such business were subject to a franchise tax, it could be validly levied in respect to that property used and held for use solely in making deliveries to said utilities or distributing companies or in transmitting gas through the State of Alabama into the State of Georgia."

The trial court held that the corporation was not liable for a franchise tax, in that its business was done in inter-[fol. 64] state commerce, and if burdened with such tax, it would be in violation of the provisions of the Federal Constitution.—Art. 1, §§ 8 and 10.

Advertising to the agreement exhibited between appellee and Alabama Natural Gas Corporation, it is recited:

"In the event that the Seller shall desire to sell or distribute natural gas to customers other than the Buyer for Sale and/or other disposition and/or other utilization in

any area covered by this agreement in which the Buyer shall be authorized to sell and distribute gas, the Seller may on the date when the delivery of gas hereunder begins or on any day thereafter give written notice to the Buyer specifying the municipality or territory in respect to which Seller desires to sell gas for distribution. The Buyer shall have one month after the receipt of any such written notice in which to elect whether or not the Buyer desires to and will undertake to engage in the distribution and/or sale of natural gas in the municipality or territory specified in such notice from the Seller and/or to sell natural gas to the customer or customers proposed to be served as specified in such notice from the Seller and within which to deliver written notice of such election to the Seller. If within any such month the Buyer shall give written notice to the Seller of its election to undertake the distribution and/or sale of natural gas in such territory and/or to sell natural gas to such customer or customers, the Buyer shall proceed forthwith so to do. In the event that (1) Buyer does not within any such month deliver to the Seller written notice of its election to undertake the sale and/or distribution of gas in such municipality or territory and/or to such customer or customers; and/or (2) Buyer fails to proceed forthwith to begin distribution and/or sale of natural gas in such territory and/or to such customer or customers, the Seller shall have the right to enter into contract with others with reference to the sale of and/or distribution of gas in such municipalities or territory and/or to such customer or customers."

The places of delivery are specified to be "at the outlets of the metering stations to be installed by the Seller at such points on Seller's main or branch line and right of way as shall be requested by Buyer (the exact location, however, to be determined by Seller) and Seller shall fur- [fol. 65] nish, install, operate and maintain at its own expense said metering stations, properly equipped with orifice meters, and recording guages, or such other type of meter or meters of standard style as may be mutually agreed upon, the measurements of which shall fix the total amount of natural gas delivered by the Seller into each of the Buyer's distribution systems. Each metering station delivering gas to the Buyer shall, for the purposes of the computation of natural gas deliveries and the ascertainment of the

monthly payments hereunder, be deemed to be separate and distinct from every other delivery point, and the deliveries of gas at the several delivery points shall be computed separately and not taken together for said purposes. The metering equipment so installed by the Seller, together with any buildings erected by it for such equipment, shall be and remain its property."

There are stipulations in Section 4, Subsections (a) and (b) for determining the temperature and specific gravity of the natural gas delivered.

Section 9 of the agreement provides all payments for gas to be made to "the seller at its office in Birmingham, Alabama, on or before the 15th day of the month, for said natural gas deliveries of the preceding month according to the natural gas measurements and computations and at the prices hereinbefore provided for and billed on said monthly statement. Should the buyer fail to pay any amount due from it to the other party when such amount is due, interest thereon shall accrue at six per cent. (6% per annum from the date when such amount was due to the date of payment. If such failure to pay continues for sixty (60) days, then the seller may discontinue deliveries of [fol. 66] natural gas, but the exercise of such right shall be in addition to any and all other remedies otherwise available to the seller."

It is further provided by Section 11, that

"In order to protect buyer's domestic and industrial customers against loss and injury occasioned by interruption of the supply of natural gas herein contracted for and to insure them continuity of service, seller hereby convenants and agrees as follows:

* * * * * * *

"To use due diligence at all times during the term of this agreement to maintain a reserve supply of natural gas sufficient as to quality and quantity and delivered under pressure adequate fully to meet the needs of all the customers of buyer hereunder.

"In order to equalize, as far as may be practicable, the rates of delivery of gas from seller to buyer during days of maximum delivery and to protect buyer's domestic and industrial customers against interruption of the supply of natural gas herein contracted for, buyer covenants and agrees to utilize the gas holders, if any, for its distribution

systems in a practical and skillful manner, in so far as their capacity permits to achieve such results."

In the event of a shortage of natural gas, it is provided:

"In case of a shortage in the supply of natural gas available to seller for delivery to buyer hereunder, it is mutually understood and agreed that the requirements of domestic consumers of the buyers shall be fully supplied from the natural gas delivered hereunder in preference to consumers purchasing natural gas for other than domestic uses (except as to the outstanding industrial contracts transferred by seller to buyer during the term fixed hereby, so long as in full force and effect).

"If for any period of time during the term hereon, the seller shall be unable or fail to deliver the full amount of natural gas required by the buyer and delivered hereunder, then the buyer shall have the right, during such time as the seller so fails to furnish the required amount of natural gas, to purchase or otherwise obtain, at its own expense, natural gas from any available source or manufactured gas to supply such portions of the requirements of its consumers as is not obtainable from the seller. Any gas manufactured to make up the buyers' requirements which the seller is failing to supply shall be deemed to be sup-
[fol. 67] plied to domestic consumers to the extent that such domestic consumers actually were supplied by the buyer and the volume deducted from the current volume for which buyer is to pay the seller at the prices set forth in subdivision (a) of Section 8 hereof."

And Section 12 describes the character of the natural gas deliverable under the agreement, as follows:

"The natural gas deliverable hereunder shall be natural gas as produced in its natural state from the wells, except that seller may extract or permit the extraction of any helium content and the natural gas gasoline from said natural gas. Seller shall not subject said natural gas, nor permit said natural gas to be subjected to any treatment in the extraction of natural gas gasoline or otherwise which shall substantially change the chemical composition of any of the component parts of said natural gas, nor permit or cause the admission of oxygen or of any other substance which will dilute said natural gas."

The contract of appellee with the Tennessee Coal, Iron & Railroad Company exhibited, contains the following stipulations:

"Seller agrees to complete said line to the delivery points hereinafter described and to begin making deliveries of gas hereunder in quantity and quality and under pressure as hereinafter specified on or before March 1, 1930, and Buyer agrees to receive and pay for the amounts of gas thereafter delivered during the life of this contract and measured under the terms and conditions hereinafter set forth:

"'* * Seller shall supply and Buyer agrees to take natural gas for use in its Bessemer Rolling Mill, its Fairfield Ala. Plant and Ensley Ala. Plant (with the option to discontinue its use in the Ensley Plant as hereinafter set forth) and for resale, for industrial use only, to other subsidiaries of the United States Steel Corporation in the Birmingham District to replace all fuel used in the above-named plants of Buyer and plants of the other subsidiaries of the United States Steel Corporation (except and to the extent that Buyer may elect to use or supply such subsidiaries with its own by-products) and excepting the fuel burned under the Buyer's boilers and the boilers of the other subsidiaries; also excepting from such requirements at the option of Buyer fuel oil for use in emergencies due to shortage of natural gas and fuel used in any of the plants for small miscellaneous purposes. Under this agreement, the Buyer shall not be prevented from buying or exchanging and using fuel oil when and if the Seller is unable to supply natural gas to meet the requirements of the Buyer.

[fol. 68] "Seller shall at its own expense provide in advance of the initial delivery date of March 1, 1930, service lines of suitable size to a point mutually agreed upon on the property of Buyer's Bessemer plant. To reach Buyer's Fairfield Plant Seller shall provide a service line that will cross Buyer's Ensley property and run in a southwesterly direction on the property of Buyer to some point mutually agreed upon, on Buyer's Fairfield premises. Buyer agrees that it will make no charge for right of way for any part of the service lines traversing its property. A suitable meter will be provided for metering gas that may be used in the Bessemer plant, in the Ensley plant and in the Fairfield plant of the Buyer and the plants of other subsidiary companies."

* * * * * * *

"The natural gas shall be delivered at a pressure of not less than 30 pounds gauge at some mutually satisfactory location or locations upon the premises of Buyer, and Seller shall there furnish, install, operate and maintain at its own expense regulating and measuring station or stations properly equipped with orifice meters and recording gauges or other type of meter or meters of standard style as may be mutually agreed upon conformable to the current recommendations of Gas Measurements Committee of American Gas Association, the measurement by which shall fix the total amount of natural gas delivered by Seller to Buyer.

"The measuring equipment so installed by Seller, together with any building erected by it for such equipment, shall be and remain its property."

* * * * * * *

"The Junkers type of calorimeter for measurement of the heating value of the gas as hereinafter prescribed shall be furnished by the Seller and remain its property. It shall be installed and maintained by the Buyer."

The place of payment and the terms of payment were fixed in this agreement as follows:

"Buyer agrees to pay Seller for natural gas delivered hereunder, beginning with date upon which deliveries of gas shall first be made, payment to be made at the office of Seller, Watts Building, Birmingham, Alabama, on or before the fifteenth (15th) of the month for said natural gas deliveries of the preceding month according to the natural gas measurements and computations, and at the prices hereinbefore provided for and billed on said monthly statement."

[fol. 69] The provisions for a franchise tax required to be levied on domestic and foreign corporations are stated in §§ 229 and 232 of the Constitution. In State v. Bradley, 207 Ala. 677, 93 So. 595, dealing with domestic corporations, it was declared: "The subject of the creator's imposition of this 'franchise tax' is the existence of the corporation, not the 'continued exercise of the corporate franchise.' K. C., M. & B. R. Co. v. Stiles, 182 Ala. 138, 142, 62 South. 734, 735; Id., 242 U. S. 111, 37 Sup. Ct. 58, 61 L. Ed. 176.

A domestic corporation not excepted by the Constitution cannot avoid or escape this 'franchise tax' by even complete corporate inactivity.'' That is, a domestic corporation, taxed upon its mere existence, pay a franchise tax on its capital stock, etc.—Detroit International Bridge Co. v. Corporation Tax Appeal Board of Michigan, 287 U. S. 295.

By § 232 of the Constitution the Legislature is required to levy a franchise tax on foreign corporations qualifying to do business in the State. The policy of the State as to domestic and foreign corporations is uniform as far as possible; hence the franchise tax on foreign corporations is levied upon the right to do business. This is stated by Mr. Justice Bouldin in Investors' Syndicate v. State, 227 Ala. 216, 149 So. 83, saying: ''The franchise tax is for the privilege of exercising corporate functions, and measured by the capital employed in Alabama.'' Domestic and foreign corporations qualifying enjoy the same powers, protection and advantages under the law. In State v. Anglo-Chilean Nitrate Sales Corporation, 225 Ala. 141, 142 So. 87, People of the State of New York, ex rel. Parke, Davis & Company v. Roberts, Comptroller, &c., 171 U. S. 659, 43 L. Ed. 323, Educational Films Corporation of America v. Hamilton Ward, 282 U. S. 379, 75 L. Ed. 400, and Flint, as General Guardian, [fol. 70] &c. v. Stone Tracy Company et al., 220 U. S. 107, 55 L. Ed. 389, the decisions are to the effect that the tax is ''laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals;'' that ''it is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods, which may be the same, whether done by corporations or individuals.''—225 Ala. 147.

The franchise tax required to be levied on foreign corporations as a prerogative to the right of exercise of its corporate functions in the State, is stated in § 232 of the Constitution and the statutes.—Acts 1927, page 176, § 54. The holding of this Court is, that the initial requirement of a privilege or franchise tax is for the right to do business in the State [Beard v. The Union & American Publishing Company, 71 Ala. 60; Farrior v. New England Mortgage Security Co., 88 Ala. 275; Nelms v. Edinburg American Land Mortgage Co., 92 Ala. 157; Sullivan v. Sullivan Timber Co., 103 Ala. 371]; and as to this, it has been uniformly

held that one act of business before qualification is sufficient to subject to the penalties imposed against foreign corporations doing business without a permit.—The State v. Bristol Savings Bank, 108 Ala. 3, 6; St. Mary's Oil Engine Co. v. Jackson Ice & Fuel Co., 224 Ala. 152, 138 So. 834.

In Investors' Syndicate v. State, 227 Ala. 216, 149 So. 83, it was observed that "This court has recently considered and carefully defined 'capital employed in this State'" in the ascertainment of the annual franchise tax to be exacted annually of a foreign corporation under the Constitution and the statutes (Acts 1927, page 176, § 54); that moneys collected on mortgage loans and deposited in a local bank [fol. 71] temporarily for remittance to the home office, moneys stipulated to be in transit to the home office, were not moneys employed in the business in Alabama; and that the book value of real estate purchased at mortgage foreclosure sales, held capital employed within the State.—Penn Mut. Life Ins. Co. v. State, 223 Ala. 332, 135 So. 346; State v. National Cash Credit Ass'n., 224 Ala. 629, 141 So. 541.

The case last-cited [State v. National Cash Credit Ass'n., 224 Ala. 629, 141 So. 541] involved liability, under § 229, of a foreign corporation holding stock of a domestic corporation for certain franchise taxes, the domestic corporation having "paid the franchise tax on the very stock sought to be made the basis of another franchise tax because of the ownership of such stock by a foreign corporation." The court declined liability under § 232 of the Constitution, and held ownership of property, stock in subsidiary Alabama corporations, money loaned to subsidiary domestic corporations conducting loan businesses, not capital employed in this State; but bills receivable given by borrowers from a foreign corporation conducting a loan business in Alabama, constitute capital employed in business in this State within our franchise tax laws. This illustrates the holdings of this court as to its definition of "capital employed in this State" under § 232 of the Constitution and the Revenue Laws, Acts 1927, page 176, § 54.

Section 232 of the Constitution provides:

"No foreign corporation shall do any business in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles

of corporation or association. Such corporation may be sued in any county where it does business, by service of process upon an agent anywhere in the state. The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this state. Strictly benevolent, educational, or religious corporations shall not be required to pay such a tax."

The statute passed in obedience to the mandate of § 232 of the Constitution, provides: "That every corporation or-
[fol. 72] ganized under the laws of any other state, nation, or territory, and doing business in this State, except strictly benevolent, educational or religious corporations, shall pay annually to the State an annual franchise tax of Two Dollars ($2.00) on each One Thousand Dollars of the actual amount of capital employed in this State," &c.—Acts 1927, page 176, § 54.

It is further required by the Constitution and statutes, that every foreign or nonresident corporation shall register and obtain an initial and annual permit under the penalties imposed for failure of compliance (Acts 1927, pages 171, 172, 173, § § 42, 43); shall be required to make a complete return on the form prescribed by the State Tax Commission showing the following facts: "First: The date and place of incorporation, and the date such corporation qualified to do business in this State; Second: The total amount of its capital employed in this State; Third: A brief statement of all property, real and personal, owned by the corporation in Alabama, giving the location and value of such property by counties; Fourth: The amount of capital employed in this State which is secured by existing mortgages on real estate in this State, upon which mortgage there shall have been paid the recording privilege tax provided by law; Fifth: Such other detailed information as the State Tax Commission may deem necessary to insure the collection of the tax due." (Acts 1927, page 177, 178, § 58). Corporations failing to make such return "shall be subject to a penalty of Ten Dollars a day for each day's failure, unless the time for filing the report has been extended by the State Tax Commission, or unless the State Tax Commission shall for good and sufficient cause remit the penalty pro-

vided in this section."—Acts 1927, page 178, § 59. There are also penalties and forfeitures for initial failures contained in §§ 7209, 7211, 7212, 7213, 7216 and 7220 of the Code, 1923.

Counsel for the appellee argue that the return made by the Southern Natural Gas Corporation was by way of a [fol. 73] precautionary measure to prevent penalties, and, in order to keep its qualifications in effect as to any incidental matters the corporation might desire to do, it made payment "on the basis of a capital employed or to be employed in the transaction of local business in Alabama not exceeding $5,000.00."

It is stated in the return, that all capital "employed in Alabama on December 31, 1930, was directly employed or directly held for the transaction of the company's interstate business and no franchise tax is payable in respect thereof." In other words, the insistence is that the imposition of a franchise tax would constitute a direct burden upon interstate commerce, contrary to the provisions of the Constitution of the United States.—Article I, § 10, Clause 2; Article I, § 8; State v. Anglo-Chilean Nitrate Sales Corporation, 225 Ala. 141, 142 So. 87, reversed by the Supreme Court of the United States in 288 U. S. 218, 77 L. Ed. 710, on the authority of Ozark Pipe Line Corporation v. Monier, et al. &c., 266 U. S. 555, 69 L. Ed. 439, and other recent decisions cited therein. The effect of the Federal decisions is thus declared in Anglo-Chilean Nitrate Sales Corporation v. Alabama, 288 U. S. 218, 77 L. Ed. 710 [716]:

"The decisions here since New York v. Roberts, 171 U. S. 660, 43 L. ed. 323, 19 S. Ct. 58, supra, definitely show that the power of the State to withhold from a foreign corporation permission to exercise its franchise to do business therein does not enable it, when granting the privilege, to burden by taxation interstate commerce carried on by such corporation within the State. And quite recently in Fidelity & D. Co. v. Tafoya, 270 U. S. 426, 70 L. ed. 664, 46 S. Ct. 331, we said (p. 434): 'Thus the right to exclude a foreign corporation cannot be used to prevent it from resorting to a federal court, Terral v. Burke Constr. Co. 257 U. S. 529, 66 L. ed. 352, 42 S. Ct. 188, 21 A. L. R. 186; or to [fol. 74] tax it upon property that by established principles the State has no power to tax, Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 S. Ct. 190, and other

cases in the same volume and later that have followed it; or to interfere with interstate commerce, Sioux Remedy Co. v. Cope, 235 U. S. 197, 203, 59 L. ed. 193, 197, 35 S. Ct. 57; Looney v. Crane Co., 245 U. S. 178, 188, 62 L. ed. 230, 235, 38 S. Ct. 85; Western U. Teleg. Co. v. Foster, 247 U. S. 105, 114, 62 L. Ed. 1006, 38 S. Ct. 438, 1 A. L. R. 1278, P. U. R. 1918D, 865.' • • •

"It follows that the Alabama statute, construed to impose a tax upon appellant for selling in that State in the original packages the nitrate imported by it from Chile, is repugnant to the imports and commerce clauses above quoted. And, as it did no other business in that State, it is not liable for any part of the tax that the state commission assessed against it."—77 L. Ed. page 716.

The facts of that case are thus stated:

"All transactions were for cash. The customers received the nitrate only upon payment of the purchase price when they took up the shipping documents through a bank of collection by paying the drafts attached. Such payments were sent to the Merchants National Bank at Mobile and by it immediately transferred to appellant in New York. Appellant had no bank account in Alabama and paid all expenses there by remittances from New York. On the date as of which appellant's return was made it had no accounts or bills receivable in Alabama and had no money there at any time except during the brief intervals that the funds were being so transmitted. It did not have or employ any capital in that State unless the importation through the port of Mobile, the storage and sale of nitrate in the manner above described constitutes capital and its employment there."

• • • • • • •

"The stipulation of the parties shows that the only transactions in Alabama in which appellant is concerned are the landing, storage and sale of the nitrate in the form and packages in which it was put up abroad and transported into the United States. The bags were kept intact, no nitrate was removed therefrom and, prior to the delivery of the same to those who bought from appellant, it was not in any manner commingled with, and did not become a part of the general mass of property within the State."—77 L. Ed. 713, 714.

The effect of the Constitutions and statute in question on the facts recited, is declared by Mr. Justice Butler, who observes of the State Constitution and the statute, as follows:

[fol. 75] "The Alabama statute in question was enacted in pursuance of § 232 of the state constitution which declares: No foreign corporation shall do any business in the State without having a place of business and an authorized agent therein and without filing with the secretary of state a certified copy of its articles of incorporation. 'The legislature shall, by general law, provide for the payment to the State of Alabama of a franchise tax by such corporation, but such franchise tax shall be based on the actual amount of capital employed in this State.' As to the meaning and purpose of the statute, we are governed by the construction put upon it by the state supreme court."—77 L. Ed. page 713.

The insistence made in State v. Anglo-Chilean Nitrate Sales Corporation, 225 Ala. 141, 142 So. 87, and on which the decision in Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218, 77 L. Ed. 710 [713] was rested is:

"Appellant maintained below and here insists that the section, construed to impose the tax in question, is repugnant to the declarations of the federal Constitution: 'No State shall, without the Consent of Congress, lay any Imports or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws,' Art. 1, § 10, cl. 2, and 'The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States * * *' Art. 1, § 8."—77 L. Ed. 713.

The decision by the majority is rested largely upon the concluding words on rehearing in State v. National Cash Credit Ass'n., 224 Ala. 629 [633], 141 So. 541, stated as follows:

"Its [State Supreme Court] decisions clearly show that the exaction is laid, not upon the authorization, right or privilege to do business in Alabama, *but upon the actual doing of business.* While the case at bar was pending on appeal there, the state supreme court in State v. National Cash Credit Asso. 224 Ala. 629, 632, 141 So. 541, held that *the mere investment in or ownership of property in the State by a foreign corporation does not subject it to the franchise*

tax. Adverting to the language of the statute, it declared that the 'property must be employed in a corporate business done in this state.' On rehearing, May 19, 1932, and after its decision in the case before us, that court said: 'We merely hold a franchise tax to be what it purports to be a tax upon the exercise or use of its franchise in Alabama for the purposes of such franchise; and that, if no corporate activity is conducted in Alabama during the period covered by the tax, the corporation does not owe a franchise tax.' "—77 L. Ed. page 713. [Italics supplied.]

[fol. 76] Adverting again to the decision in State v. Anglo-Chilean Nitrate Sales Corporation, 225 Ala. 141, 142 So. 87, Mr. Justice Butler quotes from that opinion as follows:

"• • • in the case at bar the court said: 'The defendant duly qualified as a foreign corporation to do business in this state, appointed a resident agent, and that it actually engaged in business in Alabama by selling its nitrate through a salesman both within and without the state appears as an uncontroverted fact. It seeks to be relieved from this franchise tax solely upon the theory the imported nitrate, the sale of which constituted its business, was immune from state taxation. • • • The statute here under review has no reference to imports, but is merely of a general character relating to the fixation of the amount of a franchise tax upon foreign corporations doing business in this state.' And, after referring to the manner of appellant's acceptance of orders and the collections and remittances, the court said: 'These details go to show the corporation was actually engaged in business in this state. • • •."—77 L. Ed. 713-714.

The Supreme Court of the United States concludes as follows:

"As appellant did no local business in the State, that decision plainly rests upon the assumption that Alabama had power to tax appellant's sales in original packages of the nitrate if imported into that State only for sale and that such sales constituted a business that is taxable under § 54. The Alabama statute is unlike that of Michigan examined here in Detroit International Bridge Co. v. Corporation Tax Appeal Bd. 287 U. S. 295, ante, 314, 53 S. Ct. 137, and Michi-

gan v. Michigan Trust Co., 286 U. S. 334, 342, 76 L. ed. 1136, 1138, 52 S. Ct. 512. There the tax upon a domestic corporation was imposed for the mere right to transact business."

* * * * * *

"The right to import the nitrate included the right to sell it in the original bags while it remained the property of appellant and before it lost its distinctive character as an import. State prohibition of such sales would take from the very rights in respect of importation that are conferred by the Constitution and laws of the United States. Alabama was powerless, without the consent of Congress, to tax the nitrate before such sales or to require appellant by the payment of occupation or franchise tax or otherwise to purchase from it the privilege of selling goods so imported and handled. Brown v. Maryland, 12 Wheat. 419, 436, 442-444, 6 L. ed. 678, 684, 686, 687. In that case a state license fee imposed on an importer selling imported goods in the [fol. 77] original bales or packages was condemned as repugnant to the imports and commerce clauses. Chief Justice Marshall said: (p. 444): 'All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. * * * A tax on the occupation of an importer is. * * * a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the constitution.'"
—77 L. Ed. 714-715.

The effect of the holding in State v. National Cash Credit Ass'n., 224 Ala. 629, 141 So. 541, is not a departure from the long line of our decisions, but merely a definition of the term "capital employed in this State" by foreign corporations within the purview of our cases dealing with the provisions of our Constitution. The mere fact that a distinct and domestic corporation is engaged in a like business in the State, though the latter may be a subsidiary of the foreign corporation, does not justify double taxation by way of an exaction of a franchise tax from the foreign corporation, based solely upon its holding of the stock of the subsidiary. We have by this and will later further indicate, that the two cases [State v. National Cash Credit Ass'n.,

supra, a definition of the words "capital employed in this State," and State v. Anglo-Chilean Nitrate Sales Corporation, 225 Ala. 141, 142 So. 87, an original package case] do not rule this decision, but are distinguishable from the instant agreed statement of facts. Here, the appellee exercised its right to rely upon federal immunity, if such it had, but applied for a State permit under §232 of the Constitution to do business in the State, made its return thereunder, and did the acts of business within the State by selling its gas within the terms of its contracts and affiliations indicated in the agreed statement of facts. By its action in the two respects to be indicated, obtained a franchise to do a local business within the State, in addition to such rights [fol. 78] as it had under the Federal Constitution to conduct its interstate business and its product from Louisiana and Mississippi to and through Alabama, and to sell the same at retail to consumers here on the one hand, and to their subsidiaries on the other. That is to say, it had the right, freed of penalties, to transport and sell its product at wholesale in its original form and volume within the original package case (State v. Anglo-Chilean Nitrate Sales Corporation, 225 Ala. 141, 142 So. 87; 288 U. S. 218, 77 L. Ed. 710), or to break or change its condition, character or flow within this State by the addition of artificial gas, if it so desired, or to reduce its quantity or flow by augmentation or retarding the natural flow or pressure of gas; as from that of natural and fugitive mineral to that of a manufactured product regulated by mechanical contrivance.

Such grant by the State on application of a foreign corporation is well observed by Mr. Justice Cardozo in Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218, 77 L. Ed. 718, as follows:

"By the grant thus procured, it became free, at its unfettered will, to sell at wholesale or at retail, in the original packages or in others, unhampered by the restrictions that would have limited its capacity if it had been there as an importer and with the powers of an importer only. This franchise or privilege, this grant of benefits beyond any conferred by the federal constitution, the state of Alabama was competent to tax. Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 S. Ct. 593; Ashley v. Ryan, 153 U. S. 436, 440, 38 L. ed. 773, 776; 14 S. Ct. 865, 4 Inters. Com. Rep. 664; Kansas City, Ft. S. & M. R. Co. v. Botkin,

240 U. S. 227, 60 L. ed. 617, 36 S. Ct. 261; Lusk v. Botkin, 240 U. S. 236, 60 L. ed. 621, 36 S. Ct. 263; St. Louis S. W. R. Co. v. Arkansas, 235 U. S. 350, 59 L. ed. 265, 35 S. Ct. 99; Kansas City, M. & B. R. Co. v. Stiles, 242 U. S. 111, 117, 61 L. ed. 176, 186, 37 S. Ct. 58; Flint v. Stone Tracy Co. 220 U. S. 107, 55 L. ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; Educational Films Corp. v. Ward, 282 U. S. 379, 75 L. ed. 400, 51 S. Ct. 170, 71 A. L. R. 1226; Pacific Co. v. [fol. 79] Johnson, 285 U. S. 480, 489, 76 L. ed. 893, 896, 52 S. Ct. 424; Detroit International Bridge Co. v. Corporation Tax Appeal Bd. 287 U. S. 295, ante, 314, 53 S. Ct. 137, December 5, 1932. There being competence to tax, there was competence to measure the burden of the payment by capital employed, irrespective of the use to which employment is directed. Educational Films Corp. v. Ward, 282 U. S. 379, 75 L. ed. 400, 51 S. Ct. 170, 71 A. L. R. 1226; Pacific Co. v. Johnson, 285 U. S. 480, 76 L. Ed. 893, 52 S. Ct. 424; Flint v. Stone Tracy Co., 220 U. S. 107, 55 L. ed. 389, 31 S. Ct. 342, Ann. Cas. 1912B, 1312; and Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 S. Ct. 593,—supra. There may be a wrong to the taxpayer if the standard of measurement is oppressive and unreasonable. Western U. Teleg. Co. v. Kansas, 216 U. S. 1, 54 L. ed. 355, 30 S. Ct. 190. There is none where the standard bears a fair and natural relation, in its normal or average workings, to the privilege conferred."—77 L. Ed. page 718.

No wrong was done the foreign corporation, voluntarily qualifying under State laws, by the measurement and exaction of a franchise tax under the requirements of the Constitution and the statutes of this State; the standard of measurement employed being reasonable and unoppressive. The State had the right to exact this franchise tax and the foreign corporation had the right, either to qualify or not qualify. If it desired to exceed its rights under interstate commerce, the permit gave this right.—Western Union Telegraph Company v. State of Kansas on the Relation of C. C. Coleman, Attorney General, 216 U. S. 1, 54 L. Ed. 355; The Western Union Telegraph Company v. Seay, Governor, et al., 132 U. S. 472, 33 L. Ed. 409.

The case of Ozark Pipe Line Corporation v. Roy Monier, et al., &c., 266 U. S. 555, 69 L. Ed. 439, was well-distinguished, there and here, by the dissenting opinion in Anglo-

Chilean Nitrate Sales Corp. v. Alabama, 288 U. S. 218, 77 L. Ed. 720, as follows:

[fol. 80] "None of the decisions cited by the appellant controls the case at hand.

"Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 69 L. ed. 439, 45 S. Ct. 184, is invoked with special confidence. There are obvious distinctions. The statute of Missouri there held to be invalid in its application to a corporation engaged in interstate commerce was very similar in form to the statute of Alabama in controversy here. The conduct of the aggrieved corporation was, however, very different. Its business was the operation of a pipe line from oil wells in Oklahoma passing through Missouri to a destination in Illinois. Nothing was done in Missouri, or so the court interpreted the evidence, except in furtherance of transportation. Oil was neither received nor delivered in that state. In these circumstances the corporation asked for and obtained from Missouri a license to 'engage *exclusively* in the business of transporting crude petroleum by pipe line.' 266 U. S. at pp. 561, 567. This, however, was the very business that was incidental to the federal right. The privilege to transport upon the interstate journey was an essential incident of commerce, and so an emanation from the federal power. The court did not hold that the tax would have been unlawful if laid upon a franchise emanating from the power of the state. The court condemned the tax for the reason that it read the statute as designed to lay a burden on the franchise to do business as an interstate carrier."—77 L. Ed. 720.

In Ozark Pipe Line Corporation v. Monier, et al. &c., 266 U. S. 555, 69 L. Ed. 439 [444], Mr. Justice Sutherland said:

"Some stress is laid upon the fact that the objects and purposes specified in appellant's articles of incorporation are not confined to the transportation of petroleum, but include the doing of other business local in character. As to this, it is enough to say that none of these powers were in fact exercised in the state of Missouri; and, so far as this case is concerned, the power to tax depends upon what was done, and not upon what might have been done. Moreover, the license issued by the state authorized appellant to engage 'exclusively in the business of transporting crude petroleum by pipe line.'"—69 L. Ed. 444.

The foregoing excerpt from the Ozark Pipe Line case distinguishes that case from the instant case.

[fol. 81] The power to convey its gas to the several meters and its acts in so doing, diversion stations and transmission lines thereto, its devices for measuring the amount of natural or artificial gas, or mixed, if necessary to be supplied for use, augmenting or decreasing the flow, operation, control and ownership of its switches and meters, use of its office furniture, book accounts, sales contracts, and agents engaged to keep same in Birmingham, Alabama, were as much a part of appellee's plant and system operating and doing business and capital employed within the State, as the devices, force or instrumentalities employed in directing, regulating and forcing the transmission to the several points of distribution within the State. Brown v. Gerald et al., 100 Me. 351, 109 Am. St. Rep. 526, 61 Atl. 785; Sloss-Sheffield Steel & Iron Co. v. Mobley, Admrx., &c., 139 Ala. 425; Wheeling Steel Corporation v. Fox, State Tax Commissioner, [October Term 1935] United States Supreme Court, Opinion No. 663. Such intrastate corporate acts, property holdings and the use thereof constituted the doing of business in Alabama and the employment of its capital therein by a foreign corporation, within the definition of our decisions cited above and that of the Supreme Court of the United States in East Ohio Gas Company v. Tax Commission of Ohio et al., 283 U. S. 465, 75 L. Ed. 1171, 1175. Louisville & N. R. Co. v. State, 201 Ala. 317, 78 So. 93; s. c. 248 U. S. 533, 63 L. Ed. 406; Kansas City M. & B. R. R. Co. v. Stiles, Judge, 182 Ala. 138, 62 So. 734; s. c. 242 U. S. 111, 61 L. Ed. 176; Wheeling Steel Corporation v. Fox, State Tax Commissioner, supra.

[fol. 82] If further demonstration of the doing of an intrastate business and employment of the corporation's capital in this State is necessary, this is shown by its contracts fixing prices required of domestic consumers of its natural gas at 40, 42, 43 and 45 cents per thousand cubic feet; the contract charge to commercial consumers at 18 cents per thousand cubic feet; its contract with the Tennessee Coal, Iron & Railroad Company and its several subsidiaries, under a prescribed graduated scale of from 17 to 25 cents per thousand cubic feet; and its requirement of the latter company to take gas for the use of its Bessemer Mill, its Fairfield and Ensley plants, and the other subsidiaries of

the United States Steel Corporation. We know that this mill and these plants in the places named are widely separated.—Hodge et al. v. Joy et al., 207 Ala. 198, 92 So. 171. It has been noted that the contracts stipulated deliveries and the points thereof; that such connections were to be made by the seller and the equipment for operation was to remain the property of the seller. It is further required by the contracts that service lines connecting or supplying the Fairfield and Ensley plants be located and constructed in a southwesterly direction on the property of the buyer to some point "mutually agreed upon on the buyer's Fairfield premises"; providing suitable meters that "may be used in the Bessemer Mill and Fairfield and Ensley plants of the buyer and the plants of the other subsidiary companies" of the buyer.

We have noted that contract compliances of sale and payment of gas so taken, furnished, metered or measured, and payments therefor, were made to the Birmingham office of the seller. What of the domicile of such intangibles? In the recent case of Wheeling Steel Corporation v. Fox [fol. 83] State Tax Commissioner, [October Term, 1935], United States Supreme Court, Opinion No. 663, it is said:

"When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception. Accordingly we have held that a State may properly apply the rule *mobilia sequuntur personam* and treat them as localized at the owner's domicile for purposes of taxation."

On the question of what was the actual situs, the Supreme Court of the United States, after discussing the facts at length, said:

"The Corporation established in West Virginia what has aptly been termed a 'commercial domicile'. It maintains its general business offices at Wheeling and there it keeps its books and accounting records. There its directors hold their meetings and its officers conduct the affairs of the Corporation. There, as appellant's counsel well says, 'the management functions'. The Corporation has manufacturing plants and sales offices in other States. But what is done at those plants and offices is determined and con-

trolled from the center of authority at Wheeling. The Corporation has made that the actual seat of its corporate government."

The Court then held that the bank accounts and accounts receivable located outside the State were taxable in West Virginia.

While the tax there in question was an ad valorem tax, the basis of the decision was that the Home Office in reality was in West Virginia.

While counsel for appellee argue that whatever is done in Alabama is incidental to transportation of natural gas in interstate commerce from points without the State, we hold that the franchise tax here exacted and being consid-
[fol. 84] ered is not on any basis a tax on business or a burden on the corporation's interstate commerce, but is laid on the exercise of corporate functions, or on the privilege of exercising corporate functions within the State and its employment of its capital in Alabama, domiciled at its office in Birmingham within this State. The control of the business in all of its aspects was in Birmingham, as shown by the statement of facts.

The differences, emphasized by Mr. Justice Cardozo in the Anglo-Chilean case [288 U. S. 218, 77 L. ed. 720], between the facts in the Ozark Pipe Line case [266 U. S. 555, 69 L. ed. 439] and those here presented—which differences are likewise emphasized by Mr. Justice Sutherland in Atlantic Lumber Co. v. Massachusetts, United State- Supreme Court, No. 715—take this case out of any influence which the Ozark Pipe Line case might have. Nor are the facts in the Anglo-Chilean case comparable with these. In that case there was no maintenance of an office or other corporate functions, or capital employed, other than the storage of imports in original packages accompanied by qualification to do business in Alabama. All the orders and corporate management were done in New York.

Under the contracts exhibited and the conduct of business within the State as shown by the agreed statement of facts, the decision in East Ohio Gas Company v. Tax Commission of Ohio et al., 283 U. S. 465, 75 L. ed. 1171, is conclusive of the question for decision. Mr. Justice Butler declared as follows:

[fol. 85] "Appellant relies on Pennsylvania Gas Co. v. Public Serv. Commission, 252 U. S. 23, 64 L. ed. 434, P. U. R.

1920E, 18, 40 S. Ct. 279. There the question was whether the New York commission had jurisdiction to prescribe the rates to be charged local consumers of gas transported to that state from Pennsylvania. This court, following the findings of the highest court of New York (225 N. Y. 397, 403, 404, P. U. R. 1919C, 663, 122 N. E. 260), held that the entire movement of the gas was interstate commerce and that in the absence of contrary regulation by the Congress, the state commission had jurisdiction to prescribe such rates. The theory on which that conclusion was reached is not wholly consistent with the views expressed in Public Utilities Commission v. Landon, 249 U. S. 239, 63 L. ed. 577, P. U. R. 1919C, 834 39 S. Ct. 268, supra, and in Missouri ex rel. Barrett v. Kansas Natural Gas Co. 265 U. S. 298, 68 L. ed. 1027, 44 S. Ct. 544, supra. In the former the court said (p. 245): 'Interstate movement [of natural gas being transported from state to state] ended when the gas passed into local mains.' In the latter, it was said (p. 308): 'With the delivery of the gas [transported from one state to another] to the distributing companies • • • the interstate movement ends. Its subsequent sale and delivery by these companies to their customers at retail is intrastate business and subject to state regulation. • • • In such case the effect on interstate commerce, if there be any, is indirect and incidental. • • • The business of supplying, on demand, local consumers is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount, and the interference with interstate commerce, if any, indirect and of minor importance'."

• • • • • • •

"The mere fact that the title or the custody of the gas passes while it is en route from state to state is not determinative of the question where interstate commerce ends. • • • But when the gas passes from the distribution lines into the supply mains, it necessarily is relieved of nearly all the pressure put upon it at the stations of the producing companies, its volume thereby is expanded to many times what it was while in the high pressure interstate transmis-

sion lines, and it is divided into the many thousand relatively tiny streams that enter the small service lines connecting such mains with the pipes on the consumers' premises. So segregated the gas in such service lines and pipes remains in readiness or moves forward to serve as needed. The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail."—283 U. S. 471, 472, 75 L. ed. page 1175.

[fol. 86] The recent case of Atlantic Lumber Co. v. Massachusetts, decided May 25, 1936, Supreme Court of the United States, No. 715, supports our cases of Friedlander Bros., Inc., v. Deal et al., 218 Ala. 245, 118 So. 508, and Muller Manufacturing Co. v. First National Bank of Dothan, 176 Ala. 229, 57 So. 762. Mr. Justice Sutherland, commenting on the Ozark case, concludes the opinion in the Atlantic Lumber Co. case as follows:

"There, a Maryland corporation owned and operated a pipe line extending from Oklahoma through Missouri to Illinois, by which crude petroleum was carried from Oklahoma to Illinois. No oil was received or delivered in Missouri. The license issued by the state was to engage 'exclusively in the business of transporting crude petroleum by pipe line.' The company, it is true, maintained its principal office in Missouri and there kept its books and bank accounts, paid its employees, purchased supplies, employed labor, maintained telephone and telegraph lines, and carried on various other activities; but all were linked exclusively to the pipe line and operated only to further the flow of oil in interstate commerce. Neither property nor activities were anything more than aids to the operation of the pipe line; and together with that line they combined to constitute in practical effect an instrumentality of that commerce. Thus, the burden of the tax which the State imposed fell upon interstate transportation immediately and directly, while here the effect upon interstate commerce, so far as there is any, is remote and incidental—a distinction which, in respect of such legislation as we are now considering, marks the line between a tax which is valid and one which is not."—Atlantic Lumber Co. v. Massachusetts, No. 715, Supreme Court of the United States [May 25, 1936].

We are of the opinion, and hold, that the instant corporation functioned under its charter and the privileges granted by the State under the Alabama Constitution and statute; conducted its business, employed its capital in the State in the sale of natural gas to local consumers by wholesale and retail, and was subject to the franchise tax fixed and imposed and adjudged by the State Tax Commission from which its appeal was taken. See recent cases by this Court: [fol. 87] Wisconsin Coosa Co. v. State, 165 So. 838; Gray-Knox Marble Co. v. Times Bldg. Co. et al., 225 Ala. 554, 144 So. 29; Cobb v. York Ice Machinery Corporation, 230 Ala. 95, 159 So. 811; Ford Motor Co. v. Hall Auto Co., 226 Ala. 386, 147 So. 603.

The decree of the Circuit Court is reversed, and the cause is remanded.

Reversed and Remanded.
Anderson, C. J., Brown and Knight, JJ., concur.

[fol. 88] IN SUPREME COURT OF ALABAMA

OPINION ON REHEARING

THOMAS, Justice:

Upon a reconsideration of this cause we discover no new question presented for discussion. We rest content with our original opinion on the merits.

In entering the judgment here the case was reversed and remanded, overlooking for the moment that the trial was had on an agreed statement of facts, in which case it is usual to render the judgment here which the lower court should have rendered. No reason now appears why the usual rendition of judgment should not be entered. Of our own motion we modify the former judgment of reversal and render a final judgment here for the State, rather than remand the case. It is so ordered.

The amount due on October 15th, 1936, is $15,466.69.

Reversed and Rendered.
Anderson, C. J., Brown and Knight, JJ., concur.

[fol. 89] IN SUPREME COURT OF ALABAMA

STATE OF ALABAMA,

vs.

SOUTHERN NATURAL GAS CORPORATION

DECREE OF REVERSAL—June 11, 1936

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is manifest error. It is therefore considered that the decree of the Circuit Court be reversed and annulled, and the cause remanded to said Court for further proceedings therein. It is also considered that the Appellee pay the costs of appeal of this Court and of the Circuit Court.

[fol. 90] [File endorsement omitted]

IN SUPREME COURT OF ALABAMA

[Title omitted]

APPLICATION FOR REHEARING—Filed June 26, 1936

Now comes appellee, Southern Natural Gas Corporation, and prays that the Court will grant a rehearing in the above entitled cause, and that upon such rehearing and upon further consideration thereof, the Court will set aside the opinion and judgment rendered herein on June 11, 1936, and will enter an order affirming the judgment of the Circuit Court of Montgomery County.

Unless this cause can be disposed of as contended in this application, it is respectfully requested that the judgment entered June 11, 1936, be set aside and the cause be restored to the Docket for argument before the full Court, because of the profound public importance of the questions involved.

Brief in support of this application is attached hereto.

Cabaniss & Johnston, Attorneys for Appellee.

[fol. 91] IN SUPREME COURT OF ALABAMA

3rd Div. 173

THE STATE OF ALABAMA

vs.

SOUTHERN NATURAL GAS CORPORATION

DECREE ON REHEARING—October 15, 1936

It is ordered on the rehearing of this cause that the decree of this Court rendered on June 11, 1936 reversing and remanding this cause be modified to read as follows:

Come the parties by their attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is manifest error. It is therefore considered that the decree of the Circuit Court be reversed and annulled, and this Court proceeding to render the decree the Circuit Court should have rendered, doth order, adjudge and decree that the State of Alabama do have and recover of the Southern Natural Gas Corporation and the American Surety Company of New York, surety on the appeal bond, the sum of $15,466.69, as of October 15, 1936, together with the costs in its behalf expended, for which execution may issue. Except as indicated, the application for rehearing is overruled.

It is also considered that the appellee pay the costs of appeal of this Court and of the Circuit Court.

[fol. 92] [File endorsement omitted]

IN THE SUPREME COURT OF ALABAMA

[Title omitted]

PETITION FOR APPEAL TO SUPREME COURT OF THE UNITED STATES—Filed November 23, 1936

Considering themselves aggrieved by the decision made by the Supreme Court of the State of Alabama in the above entitled cause on June 11, 1936, reversing a decree of the

Circuit Court of Montgomery County, and by an order made herein by said Supreme Court on October 15, 1936, denying an application for rehearing, and rendering final judgment herein, Southern Natural Gas Corporation, a corporation, the appellee above named, and American Surety Company of New York, as surety on the bond of Southern Natural Gas Corporation, hereby pray that an appeal by them be allowed therefrom to the Supreme Court of the United States herein, and for an order fixing the amount of the bond thereon.

In accordance with Rule 12 of the Revised Rules of the United States Supreme Court, there is presented herewith a statement disclosing the basis on which it is contended that the Supreme Court of the United States has jurisdiction to review, on appeal, the judgment of the Supreme Court of Alabama in this case.

For the errors indicated in the assignment of errors, presented herewith, and for the reasons assigned in said [fol. 93] Jurisdictional Statement, the above named, Southern Natural Gas Corporation and American Surety Company of New York, pray that the said final decision of the Supreme Court of the State of Alabama be reviewed by the Supreme Court of the United States and reversed, and a judgment rendered in favor of the petitioners (appellants), and for costs.

Cabaniss & Johnston, Attorneys for Southern Natural Gas Corporation and American Surety Company of New York.

[fol. 94] [File endorsement omitted]

IN SUPREME COURT OF ALABAMA

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 23, 1936

Now come Southern Natural Gas Corporation, appellee herein, and American Surety Company of New York, and in connection with their petition for appeal to the Supreme Court of the United States, make and file this assignment

of errors herein, to-wit, that the Supreme Court of Alabama erred:

1) In reversing the decree of the Circuit Court of Montgomery County of the State of Alabama.

2) In rendering judgment against appellee herein and against its surety, American Surety Company of New York.

3) In holding that the statute of the State of Alabama, to-wit, Section 54 of Act No. 163 approved July 22, 1927, Alabama General Acts, 1927, page 176, under which the tax involved in this suit was assessed against Southern Natural Gas Corporation is not void, as herein applied to Southern Natural Gas Corporation, as repugnant to Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law or deny to any person within its jurisdiction the equal protection of the laws.

4) In holding that the aforesaid statute of the State of Alabama under which the tax involved in this suit was [fol. 95] assessed against Southern Natural Gas Corporation, is not void, as applied to it, as repugnant to Section 8 of Article I of the Constitution of the United States which empowers Congress to regulate interstate commerce.

5) In holding that the aforesaid statute of the State of Alabama, as construed by the Supreme Court of Alabama in this suit, is not void as in violation of Section 8 of Article I of the Constitution of the United States, in that it levies a corporate franchise tax upon Southern Natural Gas Corporation for the privilege of engaging exclusively in interstate commerce in the State of Alabama.

6) In holding that the aforesaid statute of the State of Alabama, as construed by the Supreme Court of Alabama in this suit, is not void as in violation of Section 8 of Article I of the Constitution of the United States, in that it levies a tax on the right of Southern Natural Gas Corporation to carry on interstate commerce in the State of Alabama, and measures such tax by the amount of property of the Corporation in said State, which property is employed solely in the transaction of interstate commerce.

For which errors Southern Natural Gas Corporation and American Surety Company of New York, surety on its

bond, pray that said decision of the Supreme Court of Alabama dated June 11, 1936, in the above entitled cause, be reversed and a judgment be rendered in favor of the said Southern Natural Gas Corporation and its said surety.

Dated November 23, 1936.

Cabaniss & Johnston, Attorneys for Southern Natural Gas Corporation and American Surety Company of New York.

[fol. 96] [File endorsement omitted]

IN SUPREME COURT OF ALABAMA THIRD DIVISION

No. 173.

[Title omitted]

ORDER ALLOWING APPEAL—Filed November 23, 1936

On this 23rd day of November, 1936, on reading the petition for appeal in this cause to the Supreme Court of the United States from the decision entered in the above entitled suit in this Court on June 11, 1936 and from the order entered in the above entitled suit on October 15, 1936 denying an application for a rehearing, and rendering final judgment herein, and on reading the statement as to jurisdiction and the assignment of errors filed by Southern Natural Gas Corporation and American Surety Company of New York, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

It is ordered that an appeal be and the same hereby is allowed to the Supreme Court of the United States from the Supreme Court of the State of Alabama in the above entitled cause, as provided by law; and

It is further ordered that the Clerk of the Supreme Court of Alabama shall prepare and certify a transcript of the record and proceedings in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within thirty days of the date of this order; and

It is further ordered that security for costs on appeal be fixed in the sum of $500.00, and an undertaking having been

presented in the sum of $500.00 executed by Southern [fol. 97] Natural Gas Corporation and American Surety Company of New York as principals and National Surety Corporation as surety, it is now ordered that such undertaking be and the same is hereby approved; and

Whereas, the Southern Natural Gas Corporation has already given a bond with good and sufficient surety, conditioned to pay such judgment as may be rendered against it in the Circuit Court of Montgomery County, Alabama.

It is Further Ordered that the appeal herein shall operate as a supersedeas.

Done this 23rd day of Nov., 1936.

John C. Anderson, Chief Justice of the Supreme Court of Alabama.

[fols. 98-104] Citation, in usual form, showing service on A. A. Carmichael filed November 23, 1936, omitted in printing.

[fol. 105] Bond on appeal for $500.00, approved and filed November 23, 1936, omitted in printing.

[fol. 106] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 107] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed December 16, 1936

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this court in this case are as follows:

Point 1. The statute of the State of Alabama, to-wit, Section 54 of Act No. 153, approved July 22, 1927, Alabama General Acts, 1927, page 175, under which the tax involved in this suit was assessed against appellant, as construed by the Supreme Court of Alabama in this case, is unconstitutional and void as repugnant to Section 8 of Article One

of the Constitution of the United States in that it (a) levies a tax upon the right of appellant to carry on interstate commerce in the State of Alabama and measures such tax by the amount of property of the appellant in the State of Alabama which consists of property devoted exclusively to the transaction of interstate commerce; and (b) levies a corporate franchise tax upon the appellant for the privilege of engaging exclusively in interstate commerce in the State of Alabama.

The appellant further represents that the whole of the record, as filed, is necessary for the consideration of this case, except the bond and citation upon this appeal.

Dated November 23, 1936.

Forney Johnston, Counsel for Appellant.

[fols. 108-109] The undersigned, attorney of record for the appellee herein, hereby acknowledges due and timely service of the above statement of points to be relied upon and designation of the parts of the record to be printed, and agrees that the said designation includes all parts of the record material and necessary to the consideration of the case, and hereby expressly waives all right to file a counter-designation of parts of the record to be printed.

Dated Nov. 23rd, 1936.

A. A. Carmichael, Attorney General of the State of Alabama, Counsel for Appellee.

[fol. 110] [File endorsement omitted.]

Endorsed on cover: File No. 41,110.—Alabama Supreme Court. Term No. 570. Southern Natural Gas Corporation and American Surety Company of New York, appellants, vs. State of Alabama. Filed December 16, 1936. Term No. 570, O. T., 1936.